Supreme Court, U.S.
FILED
NOV 25 2008
OFFICE OF THE CLERK

No. 08-727

IN THE

Supreme Court of the United States

Lester Patrick,

Lester Patrick

v.

James B. Peake, M.D., Secreary
United States Department of Veteran Affairs
Agency.

Bobbie Montoya

On Petition For Writ Of Crtiorari
To The Ninth Circuit Court of Appeals

Lester Patrick
9522 Bismark Place
Stockton, Ca. 95209
209-957-2937

QUESTIONS PRESENTED

The Department of Veteran Affairs authorizes the use of a practice allowing its managers who serve as selecting officials in promotion procedures, of not reading the applications of best qualified candidates before they make a final selection. This is true even when the selecting official is not familiar with the work background of each best qualified candidate.

1. Does this practice violate Title VII of the Civil Rights Act of 1964 or 42 U.S.C. § 1981 and 1982 if the only applicant whose background the selecting official is not familiar with is African American?

2 Is the Department of Veteran Affairs required to follow the regulations that it has established and published in its merit promotion plans?

3. Should the United States Eastern District Court of California, and the Ninth Circuit Court of Appeals be required to grant a new trial, when new evidence is discovered that proves the jury made a decision based upon false testimony from the key witness, and when the newly found evidence disproves the testimony of the key witness?

PARTIES TO THE PRECEEDING

Petitioner is Lester Patrick. He is plaintiff in the District Court and the appeallee in the Court of Appeals. Plaintiff brings this action on his own behalf.

Respondents are Dan Maloney, who defended the case in District Court, and Bobbie J. Montoya who defended the case in the Court of Appeals.

TABLE OF CONTENTS

Page

Questions presented.....i

Patties to the proceeding..... ii

Table of authorities.....iii

Opinions below.....1

Jurisdiction.....1

Constitutional and statutory provisions involved.....1

Statement of the case.....3

I. Factual background.....4
A. Plaintiff.....3

B. Department of Veteran Affairs'....6
Selection Policy..... 3

1. Selection Policy.....7

2. The Promotion At Hand.....7

II. Proceedings Below.....9

A. The District Court.....9

B. The Court of Appeals 18

Reasons for Granting the Writ..... ..19

I. The Civil Rights Act of 1991.....20

II. The Civil Rights Act of 1964.....22

III. Giglio v. United States.....23

IV. Mitchell v. United States.....24

V. The Ninth Circuit Court Has ruled on a Federal Question that is in conflict with relevant Rulings of the Court.....25

VI. The Ninth Circuit has decided an important question of federal law that has not been ruled on by the Court.....31

VII. This case presents issues of fundamental national importance.....31

Conclusion.....32

Appendix

Exhibit 46.....1
Exhibit 47.....7
Exhibit 9.....17
Exhibit 10.....22

Exhibit 11.....26
Exhibit 12.....33
Exhibit 49.....36
Exhibit 48.....37
Exhibit 45.....38
Exhibit 13.....40
Exhibit 7.....43
Exhibit 8.....45
Exhibit 5.....46
Exhibit 2.....47
Exhibit 4.....50
Exhibit 14.....52
Exhibit 17.....56
Exhibit 18.....57
Exhibit 16.....59

TABLE OF AUTHORITIES

Page

Holohan, 294 U.S. 103, 112 (1935).....23

Napue v. Illinois, 360 U.S. 264, (1959),).....23

Pyle v. Kansas, 317 U.S. 213 (1942).....23

Brady v. Maryland, 372 U.S., at 87.....23

United States v. Keogy, 391 F.2d 138,
148 *CA2 1968).....24

MITCHELL V. UNITED STATES.....25

United States v. Keogh, 391 F.2d 138,
148 (CA2 1968).....27

Mitchell v. United States, 368 U.S. 439
(1962) 368 U.S. 439,.....28

CBOC WEST, INC. v. HUMPHRIES,..... 30

STATUES

Page

Civil Rights Act of 1866, United States Code,
Title 42, § 1982; 1981.....2

Civil Rights Act of 1964 3,9,20,22,29,31

Civil Rights Act of 1991.....21

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the Ninth Circuit Court of Appeals at Ex. 13. The decision of the District Court is reported at (Ex. 4)

JURISDICTION

The judgment of the Court of Appeals was entered on Aug. 27, 2008. (Ex. 8). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Title VII of the Civil Rights Act of 1964, Civil Rights Act of 1964 SEC. 2000e-2. *[Section 703]*

(a) It shall be an unlawful employment practice for an employer

(1). to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would

deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2 Civil Rights Act of 1866, United States Code, .Title 42, § 1982;

Which states,

"All citizens of the United States shall have the same right, in every State and Territory, as enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." and § 1981(a), and (b), which says: all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, ... and to the full and equal benefit of all laws and proceedings for the security of person and property....

(b) "Make and enforce contracts" defined

"For the purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contract the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."

STATEMENT OF THE CASE

This case presents three questions, one question about what constitutes a compelling interest that may justify the behavior of managers of any federal agency who serves as a selecting official in its agency's federal promotion and selection program; and, who makes the decision not to read material submitted by best qualified applicants when a member of a protected group under Title VII of the Civil Rights Act of 1964 or United States Code, Title 42, § 1982, and 1982 is amongst the best qualified candidates.

A second question asks if the VA is required to follow regulations that it establishes, such as the ones applicable to a selection procedure.

And another question that explores whether federal district courts and appellate courts are required to grant a new trial when new evidence is discovered after the completion of the trial. Particularly when the evidence will prove that the jury's decision was based upon testimony by the key witness who has intentionally given false testimony.

This specific case was filed against the Department of Veteran Affairs but has implications for all federal agencies and especially for members of protected groups under Title VII of the Civil Rights Act of 1964 and United States Code, Title 42, § 1982. The right to a new trial when new evidence is discovered is of compelling interest to all participants who engage in a jury trial. Therefore both of these questions have widespread national interest.

The Court has not ruled to date specifically on whether a selecting official in a federal selection procedure is

required to read the material submitted by an applicant and if not read is it discriminatory if protected members of Title VII or United States Code, Title 42, § 1982 and 1981 are amongst the best qualified candidates; therefore, the question remains to be answered. In the process of denying plaintiff's motion for a new trial the District Court ruled in support of this question. The Ninth Circuit Court of Appeals has affirmed this decision.

Several courts have ruled on the legal requirement to grant a new trial when new evidence is discovered that can prove that the jury made a decision based upon false testimony. But the United States Supreme Court has ruled in Giglio and Michell.

I. Factual Background

A. Plaintiff

Plaintiff is a civilian GS-13 Telecommunications Specialist for the Department of Veteran Affairs, who filed a suit, in pro se, under Title VII, 42 U.S.C. § 2000e-16, alleging that the VA discriminated against him when he was not selected and promoted to a GS-14 Lead Computer Specialist.

On May 15, 2000, the Agency advertised the position at issue, GS-14 Lead Computer Specialist, under Vacancy Announcement Number 107-00, within the Office of the Associate Chief Information Officer for Customer Service. The area of consideration was the VA nationwide, and the closing date was June 9, 2000. The duties of the GS-14 Lead Computer Specialist position are set forth fully in the Vacancy Announcement, and include the following tasks:

Plans, designs, analyzes, acquires, documents, tests, implements, integrates, and maintains or modifies the wide area network (WAN) computer systems. Evaluates computer network equipment with regard to this selection or utilization or designs systems and software for accomplishment of work through computer technology.

Designs, selects, maintains, and/or administers various components of a wide area network system. Serves as a telecommunications specialist for the organization. Directs or monitors activities of the organization's WAN operations unit. Facilitates team or unit processes by working collaboratively with team members or employees to ensure that tasks are completed that good working relationships among team members and with management are maintained and that team priorities, goals, needs, and achievements are coordinated with management. Functions as team leader, leading team efforts in the development, implementation, and/or evaluation of program or project responsibilities.

Basic qualifications requirements included one year of specialized experience "equivalent to GS-13 level in Federal service." Id. Further, specialized experience is defined as experience, "that demonstrates accomplishment of computer project assignments that requires a wide range of knowledge of computer requirements and techniques pertinent to the instant position." Id

The selecting official for the position, ACIO (Associate Chief Information Officer) Gail Belles, relied on the recommendation of Deputy ACIO John Rucker and Director of Enterprise Management Center Ronald Klavohn in making ultimate decision.

Three individuals, including plaintiff, were referred for consideration as, essentially, the three best qualified candidates for the position: plaintiff, Lester Patrick; Computer Specialist, GS-13, Jerry Taylor; Computer Specialist, GS-13, Washington, D.C.; and Larry Wiginton; Computer Specialist, GS-13, VAMC Tuscaloosa.

In the instant case, selecting official Gail Belles and recommending official John Rucker were in Albany, New York, while Mr. Klavohn was in the Chicago area, on the day that the selection was to be discussed.

The three had intended to meet in Albany but, due to poor weather conditions, Mr. Klavohn could not fly out of Chicago so they discussed the candidates over the telephone. Id. Plaintiff was not selected. Jerry Taylor (race non-African American) was selected for the position.

Two months prior to the advertising of the instant position, there was a transition at the Agency which involved a move of the Data Network Systems from Systems Implementation to the Customer Division. As this transition, plaintiff came under the direction of a different ACIO line, and specifically, the Customer Service Line. Prior to March 2000, plaintiff was under the ACIO of the Data Network Group. As a result of the transition, plaintiff was subject to his performance being evaluated by Jerry Taylor.

B. Department of Veteran Affairs Selection and Promotion Policy

Selection Policy

The Department of Veteran Affairs uses a promotion policy whereby vacancy announcements are advertised with the job description, job requirements, opening and closing dates of the announcement, and other relevant information. Once applications are received, a review panel of subject matter experts is convened to evaluate the applications. Additionally, a person called the selecting official is designated as the person responsible for making the final selection decision.

Once the review panel has screened the applications, a list of the best qualified candidates is created. The list of best qualified candidates is then sent to the selecting officials. The selecting official then makes a selection from that list. The VA's merit promotion procedures requires that the selecting official make that decision alone and that the selecting official become familiar with the backgrounds of all highly qualified applicants prior to making a decision. (merit promotion plan)

The Department of Veteran Affairs admits that they give the selecting official the flexibility to make selections without reading or familiarizing themselves with the background of each of the highly qualified candidates.**(Ex. 10, page 21, Ex. 11, page 26)** This is true, even though the merit promotion plan requires otherwise. **(Ex. 10, page 22, 23)**

2. The Promotion At Hand

In this promotion process three applicant's names were sent forward to the selecting official for consideration, two Caucasians and one African

American. The Plaintiff was the African American. (xxxxx) The two member review panel had worked with two of the three applicants by either supervising them or working with them in some other capacity. Neither of the two panelists had worked with the Plaintiff in any capacity either supervising him or on any projects. Mr. Rucker, the key witness testified that he worked with plaintiff on a major and high visibility project. (Ex. 9, page 16).

The selecting official knew the two Caucasians and their work background. She was not familiar at all with the work background of the Plaintiff. **(Ex. 11, page 26)** The selecting official made a selection of one of the Caucasians without reading and comparing his work background with the work background of the Plaintiff. Her decision was based strictly on input from the two panel members, also Caucasian. **(Ex.11, page 26)**

The two panel members claimed they were very familiar with the work background of the Plaintiff. Plaintiff disputed that claim.

3. VA's Promotion Data for Customer Service

The evidence of the influence that this policy has had on promotion opportunities for African Americans is that after six years of being in existence, no African American had ever been selected for a position of GS-14 or higher in the

Customer service division of the Veteran's Health Administration. Testimony from the selecting official Ms. Belles confirms this, and a memorandum from the Secretary of Veteran Affairs reflects the impact the promotion practice the VA has put into place. **(Ex. 14)**

I. PROCEEDINGS BELOW

A. The District Court

Plaintiff initially alleged both disparate impact and disparate treatment. The district court adopted the magistrate judge's ruling and recommendations on March 29, 2005 granting partial summary judgment, and dismissing the disparate impact claim. The disparate treatment claim was tried by jury from June 14 through June 16, 2005.

At trial, the Agency argued that it was perfectly OK for the selecting official to make a final decision without reading and /or reviewing all material submitted by all best qualified candidates, even though she had no knowledge of Plaintiff's background. **(Ex. 11, page 26, 27, Ex. 10, page 21)**

Ms. Belles the selecting official, admitted that the merit promotion plan requires managers to read all information about an applicant and to conduct an interview. But she still chose to ignore the regulation. **(Ex. 11, page 30)**

Plaintiff's argument and complaint was that under this policy he was being discriminated against in accordance to Title VII of the Civil Rights Act of 1964 and U.S.C. § 1981 and 1982. He did not receive fair consideration in accordance with Title VII of the Civil

Rights Act of 1964 because his work background was not reviewed by the person who was responsible for making the decision. And secondly, the two panel members who gave input to Ms. Belles the selecting official were not familiar with his work background. Mr. Rucker testified that he worked with Plaintiff on a major project call the IDNX/Micro 20 Project, that gave him exposure to the Plaintiff. **(Ex. 9, page 16, 17)**

John Rucker's testimony

Mr. Rucker testified that he hired Mr. Finney and that Mr. Finney could not have been involved with the IDNX/Micro-20 Project because he hired him after the Micro-20 Project was completed. **(Ex. 9, page 17)** At the time of the trial, it was not possible for plaintiff to disprove Mr. Rucker's testimony of when James Finney was hired because plaintiff simply didn't have the documentation available in court nor was he aware that he needed it.

Since the trial plaintiff has obtained an excerpt from Mr. Finney's service record that shows that Mr. Rucker hired Mr. Finney on Aug 23, 1992. This can be seen in the attached **Exhibit 45**, last line – **Station EOD.....AUG 23, 1992**. The Micro-20 Project started around April of 1994 and ended on or around March of 1995. Plaintiff completed and distributed the final report on or around June, 1995. **Ex. 46.** Mr. Finney had been hired by Mr. Rucker about two years prior to the IDNX/Micro-20 Project starting.

At the trial the defendant asked Mr. Rucker when he hired Mr. Finney. He then asked Mr. Rucker if Mr. Finney was involved with the Micro-20 Project. Mr. Rucker's response was that Mr. Finney was not involved with the Micro-20 Project because he hired him after the project had completed. **(Ex. 9, page 17)** The defendant made a big deal of this testimony when he was in the

presence of the jury; because his false testimony mislead the jury into thinking that Mr. Finney's testimony was not creditable. This testimony by Mr. Rucker was important because proving when Mr. Finney was hired proves that Mr. Rucker gave false testimony on the witness stand to try to make the jury disbelieve Mr. Finney's testimony that he was involved with the project and Mr. Rucker was not. Thereby proving that his testimony that he had interacted and observed plaintiff's interpersonal skills and project leader / management skills through participating in the IDNX/Micro-20 project. **Exhibit 45** is one of several documents that proves that Mr. Rucker gave false testimony about when Mr. Finney was hired and whether Mr. Finney was involved with the Micro-20 project

John Rucker's False Testimony That He was Involved with the Micro-20 Project

Mr. Rucker testified that he was involved with the Mricro-20 Project and that Mr. Finney was not involved with the project. At the time of this testimony the evidence available and presented to the court to disprove Mr. Rucker's testimony was plaintiff's testimony, Mr. Finney's testimony and Mr. Chiu's comments on plaintiff's annual performance evaluation that plaintiff was the project manager for this project. Since that time I have uncovered absolute proof that shows Mr. Rucker was not involved with the project. This document was not available during the trial.

If Mr. Rucker was involved with the project then he would had to have been involved at either the technical level or the managerial level. Plaintiff will first prove that Mr. Rucker was not involved at the technical level and then prove he was not involved at the managerial level. **Exhibit 46** contains the **Micro-20 Implementation Plan** that plaintiff developed and distributed to all parties involved with the implementation of the project.

On page 7 at the very bottom under the title **"Pilot Team Members"** is a list of all the members of the pilot team along with their site locations. **(Exhibit 46)** These are the people who served as site coordinators for their respective regions for this project. Mr. James Finney is listed as one of the pilot team members. Please note that Mr. John Rucker is not listed as a pilot team member.

The reason Mr. Rucker is not listed here is because he was not involved in any way with the project. Therefore he had no involvement with the IDNX/ Micro-20 Project and no interaction with me on the Micro-20 Project and no other project. Mr. Rucker gave false testimony that he was involvement with the Micro-20 Project, and that involvement allowed him to interact with the plaintiff sufficiently to access plaintiff's interpersonal communications skills and other traits necessary to give input to Gail Belles for promotion and evaluation purposes, but this document proves that he was not involved with the project.

John Rucker's False Testimony That the Micro-20 Project Had a Negative Impact on the Network and was Unsuccessful

During his testimony Mr. Rucker further perjured himself by testifying that the Micro-20 Project was not a success and that it caused continuous network outages at the Salt Lake City Information Field Office. **(Ex. 9, page 18, 20)**

Mr. Finney who did the hands on work on the project in Salt Lake City gave testimony to dispute John Rucker's claim. **(Ex. 12)** Plaintiff also gave testimony that disputed John Rucker's claim that this project had a very negative impact on the Wide Area Network and was not a successful project.

Exhibit 47 consists of an email that was initiated by Mr. Peter Groen, Director of Telecommunications. The subject of Mr. Groen's message is **"Micro-20 Project Results".** Mr. Groen sent this message to managers within and throughout the

Department of Veteran Affairs who were in positions of authority within the VA such as Dr. Kolodner, who was the Chief Information Officer for the Veteran Health Administration, Roy Swatzell, Director, IRM Field Office, Denis Bower, Director of Planning, Dan Maloney, Director of Technical Services, and two or three senior technical people including plaintiff who was the project manager. **Mr. Groen's comment** is emphasizing the success of this project and the need to have more projects such as this one. Mr. Groen's comments can be found in **Exhibit 47, page 1** as follows:

> "The results from the test of the Micro20 links between 3-4 ISCs was completed and Mr. Gulley, Carrick, and myself have been briefed on the potential savings to VHA of **$35-$40 million** over 5 years. This study cannot be ignored. I have arranged for Mr. Bradley to review/get a copy of Lester's report. I believe Dr. Kolodner and Mr. Swatzell need a briefing.
>
> Then we can decide on the next steps and when to get Mr. Lalley (IRM/045_ involved. The savings here are too large to not be paid attention too soon. This is the type of analysis and oversight we need to add to the functions of the VHA Telecommunications Service so it can truly provide the wide spectrum of support/service expected in this growing arena."

As I testified at the trial, the results from this pilot evolved into another pilot in VISN 15 whereby about 12 major hospitals within the states of Kansas and Missouri were interconnected to form a telemedicine network within that Veteran Information System Network (VISN). From the results of that pilot the decision was made to migrate the technology to the national backbone to support all services within the VA including Veteran Health Administration, Veterans Benefits Administration and Cemetery.

There are two points that need to be made here. ***The first point is that John Rucker is not one of the people on this message in Exhibit 47 who were consulted about the project's merits or disadvantages.*** To verify this please look at **Exhibit 47** and look at all of the people on the message string who were asked to comment. ***The reason that Mr. Rucker was not one of the people found on the message string is because Mr. Rucker had no involvement with this project at neither the managerial level nor the technical level as pointed out previously.***

This first point serves as more proof that John Rucker gave materially false testimony about his involvement with the project. **(Ex. 9, age, 16, 19, 20)** He was motivated to lie because he felt that if he could falsely link himself to this project he could falsely link himself to the plaintiff. This message further proves that he had no involvement with the project and therefore no interaction with the plaintiff as he has falsely testified. No involvement with the plaintiff meant that the observations that he claimed to have made while working with plaintiff on the Micro-20 project are not true.

The second point to be made here is that the senior managers within the Department of Veteran Affairs classified this project as a major success. (Ex. 8, page 6) There were some concerns about the required

human resources but that is always a concern. The point is that because it was a major success the money was allocated to migrate the results of what was learned from this project to the **National VA Wide Area Backbone** to support all administrations within the VA, including Veteran Health Administration, Veterans Benefits, and Cemetery.

John Rucker's testimony concerning the negative impact that this project had on VA and its customers is another example of his false testimony. (Ex. 9, page 18) **He made this testimony to intentionally mislead the jury and the Court.** Mr. Finney who was involved with the project in Salt Lake City testified that there was no negative impact to customers in Salt Lake **(Ex. 12)** City as Mr. Rucker has falsely testified. Mr. Rucker had absolutely no involvement at all with this project. The defendant placed major emphasis on this false testimony when he questioned Mr. Rucker in front of the jury. **(Ex. 9, page18)**

This message from Mr. Groen in **Exhibit 47** with all the senior managers who had input at any level concerning this project is further proof that John Rucker had no involvement with the project at the managerial level either and therefore did not have interaction with the plaintiff on this project as he testified too.

John Rucker's Testimony That James Finney Was Not Involved With the Micro-20 Project

James Finney testified that John Rucker was not involved in any way with the Micro-20 Project. Mr. Finney testified that he was the person who coordinated the Micro-20 Project in Salt Lake City **(Exhibit 12).** James Finney reported to John Rucker during this time period. Because Mr. Finney did report to John Rucker he would have reported to Mr. Rucker any problems that this product may have caused to the network. Mr. Finney testified that all input that he gave to Mr. Rucker concerning this project was positive. **(Exhibit 48, page 34)** shows a message from plaintiff to

James Finney informing him of the training that was necessary in order to participate in the project. As the project manager, plaintiff sent this message to Mr. Finney on November 10, 1994 more than two years after Mr. Finney was hired by Mr. Rucker. Since Mr. Rucker was Mr. Finney's supervisor and would have to approve his involvement with the project.

Mr. Finney forwarded a copy of this message to Mr. Rucker. Please note that the third line from the bottom of the page it shows that Mr. Finney forwarded this message to Mr. Rucker for his information on November 16, 1994.

This further proves three points. ***Point one is that Mr. Rucker lied when he testified that Mr. Finney was not involved with the project. Point two is that Mr. Rucker again gave false testimony when he said that Mr. Finney was not hired until after the completion of the Micro-20 Project, and point three that Mr. Rucker's only input concerning this project came from Mr. Finney and Mr. Finney only provided Mr. Rucker with positive input concerning the project as he has testified.***

Exhibit 49 provides further proof that James Finney was involved with the Micro-20 Project. Exhibit 49 is a certificate of completion of the training that was required for all participants in the project. Mr. Rucker testified that he was involved with the project. Mr. Rucker did not have any understanding of this technology and he did not attend the training. Again this further proves that Mr. Rucker lied when he said that he was involved with the project and further proves that he did not have the interaction with

plaintiff that he gave materially false testimony about me and was not in any position to give input to Gail Belles the selecting official input concerning plaintiff's interpersonal communications skills and project leader / manager skills.

Gail Belles' Testimony (The Selecting Official)

Gail Belles testified that she didn't review the applications, wasn't familiar with my work background but was familiar with the work backgrounds of the other two candidates. **(Ex. 11, page 10, 26, 27, 28)** The VA's Merit Promotion Plan requires the selecting official to review all available information concerning an employee before making a promotion decision. **(Ex. 11, page 10)**

Deborah Seal testified that there was no problem with Gail Belles not reading my application **(Ex. 10, page 22, 23),** but the VA's Merit Promotion Plan contradicts this. **(Exhibit 10)** She contradicts herself later by testifying that the statement **"will read all available information"** found in the VA's Merit Promotion Plan refers to the application package **(Ex. 10, page 23, bottom page)**.

The jury ruled on June 16, 2005 in a unanimous decision, that plaintiff's race was not a motivating factor for the VA's decision not to promote plaintiff. (Ex. 7) Judgment was entered against the plaintiff on June 22, 205.

New evidence

After the trial, Plaintiff located several documents to disprove the testimony of Mr. Rucker. Specifically, as described below Plaintiff was able to identify emails from senior management discussing the benefit of this project. **(Ex. 47)** This disproves Mr.

Rucker's testimony that the project was a failure and caused major network outages and further proves that Mr. Rucker was not involved with the project at the management level. I was able to locate the project plan that shows all the people involved in the project. **(Ex. 46, bottom of page 2)** This disproves Mr. Rucker's testimony about his involvement at the technical level. I was able to obtain when Mr. Finney started to work for the Department of veteran Affairs. **(Ex. 45, page 45, 46)** This disproves Mr. Rucker's testimony that Mr. Finney could not have been involved with the project because he had not been hired when the Mricro-20 project was implemented.

This newly discovered evidence proves that Mr. Rucker gave false testimony during the trial. This testimony was extremely important to the Agency's case, because Ms. Belles, the selecting official testified that she didn't read my application because she relied upon the advice of Mr. Rucker and Mr. Klavohn. The reality is that neither Mr. Rucker nor Mr. Klavohn

was knowledgeable of Plaintiff's work background. **Ex. 9, page 19, 20)** Mr. Rucker however, gave false testimony that he had worked with Plaintiff on this major project, the Micro-20 Project that Plaintiff was the project manager. **(Ex. 47, 48)**

Plaintiff filed a motion for a new trial on June 24, 2005 pursuant to Rule 59 of the Federal Rules of Civil Procedure. **(Ex. 3)** The motion was denied by an order filed on August 19, 2005. **(Ex. 4)**

B. The Court of Appeals

On Oct. 6, 2005 Plaintiff filed a motion for appeal to the Ninth Circuit Court of Appeals. The motion raised multiple issues. **(Ex. 5)**

On May 2, 2008 the Ninth Circuit issued a ruling against Plaintiff denying the motion for a new trial. **(Ex. 6)**

Circuit Judges Graber, Fisher, and Berzon made the ruling.

In the ruling the judges stated that the district court did not abuse its discretion when it found that the verdict was not against the weight of the evidence. **(Ex. 6)**

They also stated that the Plaintiff failed to raise the perjured testimony and many of other issues before the district court, and therefore waived them on appeal. **(Ex. 6)**

Additionally, they stated that my contention of the credibility issue of Mr. Rucker is an issue for the jury and not generally subject to appellate review. **(Ex. 6)**

Lastly, they stated that my contention that the evidence in my favor outweighed the verdict, but that I failed to address the evidence in support of defendant's arguments. They went on to say that the district court did not abuse its discretion when it found that the verdict was not against the weight of the evidence.

Plaintiff filed a motion for an extension to file a petition for rehearing. On Jun 12, 2008 the petition for a rehearing was granted for no later than July 14, 2008. **(Ex. 7)**

On July 14, 2008 Plaintiff filed a motion for rehearing. On August 27, 2008 the petition for a rehearing was denied. **(Ex. 8)**

REASONS FOR GRANTING THE WRIT

There can be no serious doubt that the policy that the Department of Veteran Affairs uses in its promotion and selection process of not reading or reviewing the work background of the best qualified candidates when members of minorities are amongst the best qualified candidates has great national importance for VA and employees of other federal agencies nationally. This is especially true for African Americans and other members of protected groups under Title VII of the Civil Rights Act of 1964.

The impact of this policy can bee seen in the lack of African Americans and other minorities at the GS-14 level and above. The Secretary of Veteran Affairs has acknowledged that minorities and women are underrepresented at these levels. **(Ex. 14)** It is also evident by the deterrent affect it has on minorities relative to applying for positions at GS-14 and higher..

The Department of Veteran Affairs' position is that the selection official can rely upon the recommendations of the panel members **(Ex. 10, page 20, 21)** But the merit promotion plan of the organization states otherwise. **(Ex. 100, page 22 bottom, 23, 24, 25)** This is of major national importance because if the VA is allowed to ignore some best qualified candidates' work background who also might be a member of a protected group, then that member is being discriminated against. This is what happened to the Plaintiff in this case when his application was not read by the Ms. Belles the selecting official. **(Ex. 11, page 26-29)** *Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.*

Additionally, this policy also violates 42 U.S. § 1981, which gives all persons the same right to make and enforce contracts as is enjoyed by white citizens.

I. THE CIVIL RIGHTS ACT OF 1991

"In 1989, the Supreme Court in Patterson v. McLean Credit Union, 491 U.S. 164, significantly limited the scope of &1981. It wrote that the statutory phrase did not apply to "conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." "Thus § 1981 did not encompass the claim of a black employee who charged that her employer had violated her employment contract by harassing her and failing to promote her, all because of here race." Ibid.

"In 1991, however, Congress weighted in on the matter. Congress passed the Civil Rights Act of 1991, § 101, 105 Stat. 1071, with the design to supersede Patterson. Jones v. R.R. Donnelly & Sons Co., 541 U.S. 369 383(2004). Insofar as is relevant here, the new law changed 42 U.S.C. § 1981 by reenacting the former provisions, designating it as § 1981(a), and adding a new subsection, (b), which, says: "Make and enforce contracts' defined "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.""

"With this clarification Congress made it clear that African Americans are protected from employment discrimination , would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring."

Therefore, when Ms. Belles refuses to read and review Plaintiff's application she is violating Plaintiff's civil rights to make and enforce contracts in the employment environment the same as Whites. Specifically, as an African American, I have a right to have the selecting official, who is the only person who has the authority to make the final selection to promote, read and review my application before making a decision. Not to do this is discriminatory.

When the VA uses this policy, of allowing the selecting official to make a final decision without reading or reviewing the application material of the highly qualified applicants when any African American or any other person of a protected group is one of the highly qualified candidates, the decision has national importance not only throughout the Department of Veteran Affairs, but also within other Federal Agencies nationally.

II. CIVIL RIGHTS ACT OF 1964

This same argument holds true for Plaintiff's rights in accordance with Title VII of the Civil Rights Act of 1964. Whenever the policy of allowing a selecting official to not read the application and other material submitted by Plaintiff to support his suitability for the position, Plaintiff's rights are being violated as a member of a protected group under Title VII provisions of the Civil Rights Act of 1964. Specifically, the Civil Rights Act of 1964 SEC. 2000e-2. *[Section 703]*

(b) It shall be an unlawful employment practice for an employer

2. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

3. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

When the VA uses this policy it is violating Plaintiff's rights in accordance with section 703.a.1 & 2 of this act. The results of this policy on Plaintiff and others employees within the Department of Veteran Affairs and other Federal Agencies is of national importance.

III. GIGLIO v. UNITED STATES

In Giglio, the Petitioner filed a motion for a new trial on the basis of newly discovered evidence contending that the Government failed to disclose an alleged promise of leniency made.

Mr. Chief Justice Burger wrote the opinion of the Court in this case. He wrote "As long ago as Mooney v. Holohan, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of Known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in Pyle v. Kansas, 317 U.S. 213 (1942). In Napue v. Illinois, 360 U.S. 264, (1959), we said, "(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id., at 269. Thereafter Brady v. Maryland, 372 U.S., at 87, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See American [405 I.S. 150, 154] Bar

Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence. "nondisclosure of evidence affecting credibility falls within this general rule Napue, supra, at 269. We do not, however automatically require a new trial whenever "a combing in of the prosecutors' files are the trial as disclosed evidence possibly useful to the defense but to likely to have changed the verdict..." United States v. Keogy, 391 F.2d 138, 148 *CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87, A new trial is required if "the false testimony could...in any reasonable likelihood have affected the judgment of the jury...."Napue, supra, at 271."

Mr. Rucker's testimony did deliberately deceive the jury and the court. The jury believed that Plaintiff had not proven his case by a preponderance of the evidence because Mr. Rucker's testimony convinced the jury that he had worked with Plaintiff on a major project, that the project was a major failure, that Mr. Finney was not involved with the project at all. This meant that when the jury compared the successful candidate's experience and background with that of plaintiff's, John Rucker's false testimony had convinced them that my background was inferior to the successful candidate. And that wasn't the case.

Mr. Rucker was also able to convince the jury that he had lots of interaction with the Plaintiff, when in fact he had none at all. He convinced the jury that his interaction with the Plaintiff was enough to qualify him to access Plaintiff's work background

and make a recommendation to the selecting official. Yet Mr. Rucker's testimony was false, and caused the jury to make a decision based on false testimony.

Mr. Rucker's testimony had a major impact on the outcome of the trial. The new evidence disproves Mr. Rucker's testimony. Therefore if Mr. Rucker's testimony is not true, and Mr. Klavohn was not aware of my work background as he testified, and Ms. Belles didn't even read the applications, Plaintiff was never considered for the promotion.

IV. MITCHELL V. UNITED STATES

In Mitchell v. United States, Mitchell filed a "Motion for Dismissal of Sentence and Reversal of Verdict". Mitchell claimed inter alia, that materially false testimony had been used against him at trial.

The District Court denied the motion. The Court of Appeals affirmed. The Petitioner had produced in the appeals court for the first time an affidavit of a police captain which contradicted the testimony of a prosecution witness.

The Supreme Court granted the certiorari, and judgment was vacated. The case was then remanded to the District Court for a hearing upon petitioner's motion treated as a motion for a new trial on the ground of newly discovered evidence.

In Plaintiff's case, materially false testimony was used against me in the district court hearing. Plaintiff discovered new evidence after the trial that proves that the key witness's testimony is false.

Both the District Court and the Appeals Court denied Plaintiff's motion for a new trial. The appellate court commented that I didn't raise this new evidence in

District Court. This new evidence was raised the District Court in the motion for a new trial. It was also raised in appeals court. **(Ex.16)**The Supreme Court noted in Mitchell, that the petitioner raised the evidence in appellate court for the first. Nevertheless, the Court still granted a certiorari. Plaintiff believes that in his case a certiorari should be granted and the case remanded to District Court for the new evidence to be heard, just as in Mitchell.

V. THE NINTH CIRCUIT'S COURT HAS RULED ON A FEDERAL QUESTION THAT IS IN CONFLICT WITH RELEVANT RULINGS OF THIS COURT.

The Ninth Circuit Court's ruling in this case is in conflict with relevant rulings of this court. In Mooney v Holohan, 294 U.S. 103, 112 (1935), "this court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was infirmed in Pyle v. Kansas, 317 U.S. 213 (1942). In Napue v Illinois, 360 U.S. 264 (1959), we said, "[t]he same results obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id, at 269 Thereafter Brady v. Maryland, 373 U.S., at 87, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See American [405 U.S. 150, 154] Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function 3.11 (a). When the "reliability of a given witness may well be determinative of guild or innocence, "

nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra, at 269. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict...."United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87. A new trial is required if the "false testimony could ... in any reasonable likelihood have affected the judgment of the jury.... Napue, supra, at 271."

In this case the Ninth Circuit Court of Appeals ' ruling is in conflict with relevant decisions of this Court, such as Mooney v Holohan; Pyle v. Kansas, 317 U.S. 213 (1942); Giglio, and others.

In this case the Ninth Circuit Court of Appeals commented "Patrick contends that he is entitled to a new trial because the verdict was based on perjured testimony and there were numerous inconsistencies in the testimony offered by defendant. Patrick failed to raise many of these issues before the district court, and therefore waived them of appeal. See A1- Ambulance Service, Inc. v. County of Monterey, 90 F.3d 333, 338 (9th Cir. 1996). To the extent Patrick did not waive, his contentions fail because credibility is an issue for the jury and is not generally subject to appellate review. See Murray v. Laborers Unions Local No. 324, 55 F.3d 1445, 1452, (9th Cir. 1995) (the Credibility of witnesses and the weight of the evidence are issues for the jury and are not subject to appellate review.")

Plaintiff did raise this issue in district court. The new evidence was discovered after the trial was completed. **(Ex. 16)**

In Mitchell v. United States, 368 U.S. 439 (1962) 368 U.S. 439, this court ruled that even though petitioner had produced new evidence for the first time, an affidavit of a police captain which contradicted the testimony of a prosecution witness, the Certiorari was granted; judgment was vacated; and the case was remanded to the District Court for a hearing upon petitioner's motion.

In the instant case Plaintiff has discovered new evidence that was submitted to both the district court and the appeals court. **(Ex. 16)**

The Ninth Circuit Court of Appeals' ruling in this case conflicts with relevant decisions of this court. Therefore it is extremely important for this court to review this case and remand it back to district court for the new evidence to be heard..

III. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN RULED ON BY THIS COURT.

In making the ruling that it did in this case, the Ninth Circuit Court of Appeals and the district court decided a question of federal law that this court has not ruled on and should be ruled on

When the Ninth Circuit Court of Appeals and the Eastern District Court of California ruled in this case they decided that it is not discriminatory for the Department of Veteran Affairs to support a practice whereby its selecting officials do not read the applications of the best qualified candidates for a vacancy when a member of a protected group under Title VII is amongst the best qualified candidates.

Both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1982 prohibits this practice. This Court has ruled in CBOC WEST, INC. v. HUMPHRIES, that "all citizens shall have the right,...as is enjoyed by white citizens...to inherit, purchase, lease, sell, hold, and convey real and personal property." In this case three candidates' names were forwarded to the selecting official. Two of the candidates were White and the Plaintiff, African American. The selecting official, Ms. Belles testified that she didn't' read the applications. **(Ex. 11, page 26))** She was very familiar with the backgrounds of the other two candidates who were white. She was not familiar with complainant's background at all. **(Ex. 11, 26, 27)**

Two white managers recommended to Ms. Belles who to promote. These two mangers claimed they were familiar with plaintiff's background. **(Ex. 9, page 16, 18).** To justify his recommendation Mr. Rucker claimed that he had worked with plaintiff on a major project **(Ex. 9, page 16)**. However, the new evidence proves that Mr. Rucker gave false testimony.

The selecting official made a decision to promote the person that she did without even reviewing Plaintiff's work history. This policy that Ms. Belles followed and that is authorized by the Agency, prevented Plaintiff from realizing the same rights, as the two white candidates of being seriously considered for the position. It conflicts with 42 U.S. § 1982 and § 1981 that this Court has interpreted as " [a]ll citizens ...shall have the same right, ..., as is enjoyed by white citizens.. to inherit, purchase, lease, sell hold, and convey real and personal property."

Additionally, the Department of Veteran Affairs has a merit promotion plan that requires that selecting officials review all of the information submitted by the candidates. **(Ex. 11, page 27 bottom, page 28)**

In accordance with the Title VII of the Civil Rights Act of 1964, it is illegal to exclude members of one group from particular positions or to group or categorize employees or jobs so that certain jobs are generally held by members of a certain protected group. The policy that the VA uses of not reading applications results in middle managers making recommendations to the selecting official of candidates who are all white for positions of GS-14 and above. **(Ex 17)** The selecting official who has the sole responsibility to make the final selection don't read the applications, therefore the member of the protected group is never considered for the position. This violates Title VII of the Civil Rights Act of 1964 and is in conflict with the interpretation of this Court.

It is imperative that the question of whether the policy that the Department of Veteran Affairs uses, of authorizing its managers who serve as a selecting official for a promotion, to not read the applications of the highly qualified candidates be answered by this Court.

Equally important for this Court to answer is; whether the Department of Veteran Affairs is required to follow the regulations that it establishes and publish relative to merit promotion. **((Ex. 11, page 27 bottom, page 28), Ex. 10, page 22-24)**
And finally, the question of whether the District Court and the Appeals Court is required to grant a new trial when new evidence is discovered that proves the key witness gave intentionally materially false evidence that influenced the jury's decision.

VI. THIS CASE PRESENTS ISSUES OF FUNDAMENTAL NATIONAL IMPORTANCE

The questions that have been presented here pose three issues that are of fundamental national importance.

When selecting officials in the Department of Veteran Affairs do not read the applications of each best qualified candidate, they resort to mid level managers for recommendations as to who to hire. Just as in this case it results in selections not being made based upon the requirements as announced in the vacancy announcement.

It is not enough after a selection has been made to simply say that management placed more emphasis on one given area to support its selection decision if the area cited is not an officially announced requirement of the job. The end result of this practice is to have employees selected into positions for reasons unrelated to the job requirements. **(Ex 14)**

The policy of the selecting official of not reading the applications of the best qualified candidates impacts any member of a protected group in accordance with the Civil Rights Act of 1964. Since this policy is widely used throughout the entire Department of Veteran Affairs its impact is felt on a national basis. A decision on this question will also have an impact on all federal agencies nation wide.

The case of a witness intentionally giving false testimony to a jury with the intention of misleading the jury has been addressed by this Court in Giglio but the Ninth Circuit Appeals Court and the District Court made a decision that is in conflict with this Court's position as it relates to new evidence and materially false testimony. A response to this question

has national impact because it deals with testimony of federal employees in a promotion case. False testimony is very common in these cases. Therefore the Court's answer to this question will have a national impact on all promotion cases that reaches the hearing and district court stage.

CONCLUSION

For the foregoing reasons, Lester Patrick respectfully requests the Court to grant his petition for certiorari.

Respectfully submitted,

Lester Patrick
9522 Bismark Place
Stockton, Ca. 95209
(209) 957-2937

Ex. 46

MICRO 20 IMPLMENTATION PLAN

The implementation plan will be implemented in four phases. Each phase has been listed below along with the specific task, responsible entity, and the expected implementation date. Also attached is a diagram reflecting the configuration of each phase.

OBJECTIVES

The objectives of this pilot project are as follows:

1. Improve response times on tie MIRMA WAN for LAN applications.

2. Establish a frame relay network over existing T1s between ISCS.

3. Interconnect the Mira Fame Relay Network with FTS-2000 Frame Relay Network.

4. Interconnect FTS-2000 SDIS network and MIRMA network.

5. Integrate voice and data over the existing MIRMA WAN.

6. Implement network management overdue existing MIRMA WAN.

7. Improve network efficiency, demonstrate potential reduction in both telecommunications and the number of employees needed to support the network.

Ex. 46

GOALS

1. Demonstrate and document improvement in response time for large file transfers by at least 25%.

2. Demonstrate and document, using existing T1 facilities the integration of voice and data applications onto a single, existing T1 facility.

3. Design and implement a frame relay network, to allow pilot sites to transiently (communicate to other pilot sites using fame relay.

4. Design and implement the interconnection of voice and frame relay onto FTS-2000 SDIS.

5. Demonstrate acceptable voice quality using voice compression modules on the MIRMA WAN network.

PILOT TEAM MEMBERS

VA	Lester Patrick	San Francisco ISC
VA	Don Wilson	Dallas ISC
VA	James Fenny	Salt Lake ISC
VA	Bob Haggle	Hines ISC
NET	Jack Staley	Washington, DC
NET	Tilton Quon	San Francisco

Ex. 46

IMPLEMENTATION PHASES

Phase 1	Configuration
Phase 2	LAN
Phase 3	Frame Relay
Phase 4 SDIS	Voice / Integration into FTS-2000 Network
Phase 5 Relay	Integration into FTS-2000 Frame Network

Phase 1 Configuration

TASK	RESPONSIBILITY	DATE
1. Identify nodes to participate in the Pilot Project.	VA	4-8-94
2. Develop proposed configuration design.	VA	4-8-94
3. Present proposed config- to LAN/WAN committee.	VA	4-22-94
4. Meet with vendor to discuss Proposal.	VA	4-25-94
5. Identify hardware components needed for the pilot, port assignments, etc.	VA	4-25-94

Ex. 46

6. Discuss free evaluation conditions.	VA	4-25-94
7. Develop Implementation / Test Plan.	VA	5-23-94
8. Discuss implementation with LAN/WAN Committee.	VA	6-03-94

Phase 1 Configuration

TASK	RESPONSIBILITY	DATE
9. Request evaluation equipment from vendor.	VA	6-4-94
10. Contact AT&T and Sprint to discuss implementations plan.	VA	6-5-94
11. Coordinate three day training on T1 Mux.	VA	11-6-94
12. Arrange for T1-Mux installaction and configuration.	VA	11-8-94
13. Attend three day training of IDNX (T1-Mux).	VA	12-5-94
14. Provide detailed network of port configuration.	VA	12-12-94

Ex. 46

Phase 1 Configuration

TASK	RESPONSIBILITY	DATE
15. Receive equipment.	VA	12-19-94
16. Configure and install equipment.	VA	12-27-94
17. Cutover T1 all trunks to IDNX.	VA	12-29-94

Ex. 47

Mailman message for PATRICK, LESTER
COMMUNICATIONS SPEC
Printed at FORUM.VA.GOV 12 MAR 96 13:14
Subj: MICRO20 PROJECT RESULTS
[#15999129] 13 JUNE 95 12:29 11 Lines
From: GROEN, PETER – DIRECTOR OF TELECOMMUNICATIONS 50 OF 50
Responses read.
'micro-20' basket. Page 1

The results from the test of the Micro20 links between 3-4 ISCs was completed and Mr. Gulley, Carrick, and myself have been briefed on the potential savings to VHA of $35-$40 million ove 5 years. This study cannot be ignored. I have arranged for Mr. Bradley to review/get a copy of Lesters' report. I believe Dr. Kolodner and MR. Swatzell need a briefing. Then we can decide on the next steps and when to get MR. Lalley (IRM/045) involved. The savings here are too large to not be paid attention to soon. This is the type of analysis and oversight we need to add to the functions of the VHA Telecommunications Service expected in this growing arena.

1) CARRICK, MICHAEL – HARDWARE & TELCOMM SPEC (SAN F) 13 JUN 95 15:12

Thanks, Peter. It is a bit of an eye opener and caused me to recheck some of my assumptions. A brief talk with John Harrison led me to believe that the findings are essentially valid, and if anything, understated.

2) BISHIP, DAN – DIRECTOR SOFTWARE SERVICES (Albany IRM Field Office)
14 JUN 95 14:39 1 line

Ex. 47

(page 1 continued)

Does this have the endorsement of Ron Klavohn and his campus support team?

3) KOLDNER, ROBERT – DEPUTY, CHIEF INFO OFFICER (Deputy Chf Information Officer) 15 Jun 95 01:06 5 lines

We need to move forward to get OIRM involved in the decision and to have them understand this is a benefit to all of the VA.

We have the money to buy the equipment this year, and need to play this up, but OIRM must be on board, all the way up to Nada.

4) DLODNER, ROBERT – DEPUTY CHIEF INFO OFFICER (Deputy Chief Information Officer)
15 Jun 95 01:09 1 Line

Will VBA and OIRM be able to benefit from using this system, too?

5) SWATZELL, ROOY – DIRECTOR, IRM FIELD OFFICE (Director, IRM Field Office)
15 Jun 95 08:03 3 Lines

Pete, do you have the analysis. I am interested in reviewing the cost of getting this going and where the savings come from. Can I get a copy before the meeting next week?

6) GROEN, PETER – DIRECTOR OF TELECOMMUNICATIONS 15 Jun 95 13:05 1 line

I've had Lester send copies to you, Rob Dave, etc.

Ex. 47

Sub: MOCRO20 PROJECT RESULTS [15999129]

Page 2

7) BROWSER, DENNIS - DIRECTOR OF PLANNING (PLANNING & BUDGET STATT)
15 Jun 95 14:17 2 Lines

WHAT EQUIPMENT BUYS NEED TO BE MADE TO GET THIS OFF THE GROUND – AMOUNT ?
DENNIS

8) MALONEY, DAN - DIRECTOR TECHNICAL SERVICES (WASHING ISC)
20 Jun 95 00:03 2 Lines

Can someone please forward a copy of this document on to Dave Bradley and me? It would be appreciated.

9) PROSSER, EDWARD F – MANAGEMENT ANALYST (Telecommunications Support SVC)
20 Jun 95 10:39 3 Lines

Time is flying bye, if this is to happen this fiscal year, there are probably a lot of hoops to be jumped through in a short time.

10) BROWSER, DENNIS - DIRECTOR OF PLANNING (PLANNING & BUDGET STATT)
20 Jun 95 15:03 3 Lines

time is flying bye, if this is to happen this fiscal year; there are probably a lot of hoops to be jumped through in a short time.

Ex. 47

(page 2 continued)

10) BRADLEY, DAVID E - SYSTEMS ANALYST (Washington IRM Field Office)
21 Jun 95 11:05 54 Lines

Sorry this is late, maybe too late.

"this system" is actually a collection of may items – T1 lines, inverse multiplexors, and more importantly – someone (or organization) to manage it all.

Before a rapid decision is made to hurry and spend a lot of money, a little bit of though may prove to be warranted,

The micro20 approach may be a good idea technically and perhaps $ - I have not had a chance to fully review the dollar-analysis, It presents may pros and cons –

+ potentially saves some money on idcu costs and fts2000
- irm field offices STILL need frame relay (IDCU) in order to talk to other (VAMC) locations that won't be on micro20 "net"

- who is going to manage the lines and boxes? Nobody here (WIFO) has the ability, and other campuses are short "operations" folks too, its not "self-managing", not that IDCU is, but the current MIRMO WAN is and has been essentially un-managed.

Ex. 47

(Page 3)

- may have national implications for cost savings, but
- these need to be worked thru 045B and THAT won't be practical in the next few weeks ....

- it was asked if VBA and OIRM could "benefit" yes If they had dedicated T1 lines from their locations to other M20 locations in VHA if that was the idea. – it essentially creates an internal, VA – managed network, if it expands to a lot of offices, etc. – which will PROBABLY end up creating a new 'job opportunity' for 045B to take over, aka similar to IDCU. Else who DOES manage it? (it will be more than 7 locations, if you take into account all the new and existing MIRMO field offices, etc.)

It seems like a crisis has been created, and I'm not sure why, We are moving on frame relay (albeit slowly) and from a MIRMO WAN perspective, it will provide improvements to what exists now at the MIRMO campuses in terms of network access.

If it's the dollar aspect – bear in mind that IDCU costs for this FY are pretty well fixed, wear in a certain level of backbone traffic that, until it is reduced a few billion char a month or increased a few more billion (and it does NOT include frame relay traffic which is not character-based) it will remain constant.

Do I really care? No. I guess I'm just trying to advocate a little thought to this rather than, in a matter of days, spending a lot of money. (If there's that much money left, I'd rather see it spent on buying some data network at the VAMCs this FY.)

Ex. 47

(Page 3 continued)

12) PATRICKK, LESTER – COMMUNICATIONS SPEC (SAN FRANCISCO ISC) 21 Jun 95 14:01
105 Lines

#4 Yes, VBA and OIRM will be able to benefit from this type configuration. Although the report has primarily focused on VHA, major consideration was given during the evaluation period to the need to make this happen VA wide.

#5 More copies or the report are being mailed today.

#7 The prices I am providing are estimates, but are very close. The cost will vary depending upon the configuration that we decide to support. Support for 7 ISCs based on multiple T1 connectivity.
$450,000.00 (as stated in the evaluation report)
Include maintenance, installation, etc.

(page 4)

Support for 7 ISCs based on T3 connectivity. (high speed backbone).

$850,000.00

Include maintenance, installation, etc.

* We will need to decide if we are going with the High Speed Backbone (45 mbps) config or multiple T1 backbone config.

Ex. 47

(Page 4 continued)

* This equipment is on GSA schedule.
#11 Thanks for your comments. I will not respond to each point that you made simply because answers too many of the points you raised may be found in the evaluation report, I will give you a chance to read through it, and I am sure you will find answers to several of he points raised.

Thought and Planning

Let me start out by saying that much though and planning have been dedicated to this project, I share your concern about being certain about making the correct decision relative to a national high speed network. I look forward to the opportunity to discuss with you the details of how this can easily be accomplished with the recommendations that have been made.

Crisis Situation

I agree a crisis situation has been identified. Let me point out that by year e000, just five years for now, we will be paying $144,000,0000.00 for IDCU and frame relay service. Ninety-six-million of that will be for thc IDCU nctwork alone. Yes, I consider that a major crisis. Especially, when we have a plan, and are in a situation whereby be can save or eliminate the majority of that cost and improve service.

Ex. 47

(Page 4 continued)

Cost Savings

The potential cost savings are enormous. Some examples have been cited in the evaluation report. Now is the time to begin to manage telecommunications costs that are very out of proportion with the services we receive.

Management of the Network

One of the major advantages of this configuration is hat it reduces the number of people needed to support the network. This is done by consolidating several components into one. Many organizations have found this to be a major advantage.

Management of this equipment will not be very much different from the management of the IDCU

(Page 5)

equipment today. My belief is that the telecomm team should have the responsibility of managing this network. As part of the reorganization effort, we should look at ways of making better use of the human resources that we have now. This recommendation will allow us to do that.

Frame Relay Network / IRM Field Offices

In the evaluation report I made a comparison between the national frame relay network as it is being implemented and a frame relay network based on existing T1 connections. I will not go into the details, but I just would like to make the point that it is much less expensive to provide frame relay in a dedicated environment, especially when the T1 facilities already exists between locations.

Ex. 47

(Page 5 continued)

The frame relay network that is currently being implemented will not meet VA current and evolving needs. We will need a hybrid network. We must take the opportunity today to address the needs that we will have two years from now. We must not wait two years from now to make the decision.

045B Involvement

I agree that this needs to be a joint effort between VBA, VHA, etc. The goal should be for us to implement a national network to support the entire VA. This does not prevent us from moving ahead with the plans that are already in place for the ISCs. We should take the opportunity to reduce telecommunications costs for VHA facilities immediately.

There will be no functional disadvantages. This was proven during the evaluation period.

Thanks for your comments. I hop we are able to talk about this in more detail after you have had the opportunity to read the report.

13) BRADLEY, DAVID E – SYSTEMS ANALYST (Wash IRM Field Office)
26 Jun 95 08:49 75 Lines

I had a chance to review the report, thanks. May good ideas and concepts, I'll offer a few geneal comments, Please, these should not be taken as "IDCU frame relay vs. Micro20" debate. I don't have a preference in this whole thing aside from being practical.

Ex. 47

(Page 5 continued)

1. some of he IDCU frame relay cost assumptions were 'high' – frame relay T1s are less than $5000 per given the closer connectivity to backbone switches than the existing translan network (not all, but most). Our Dallas-Wash T1 is $5000 and no frame relay T1 is that long. Additionally, the cost for IDCU frame relay DOES include management, maintenance, etc. (first page, Appendix B).

Ex. 9

Excerpt from Mr. Rucker's testimony, Page 135. (examination of Mr. Rucker by Plaintiff)

Q. You have testified that you have worked with me on some projects?

A. Yes.

Q. Could you please name some of those projects?

A. The IDNX project, I believe, was the first one that were worked together on, and that was when you were in San Francisco and I was in Salt Lake.

Q. Could you, just for the purpose of the – clarifying this for the Court, is the IDNX project the same as the Micro-20 project?

A. When I think of the Micro 20 project, I think of the Trans LAN or Vitalink project, that's what Micro 20 means to me.

Page 137, (Plaintiff's examination of Mr. Rucker)

Q. Okay. So, are you aware that using the separate transmission facilities there was no interference with the live network?

A. Well, I can only speak to the fact that on several occasions we were completely cut off from the network when you were using the equipment, and we had discussions to that effect. And I funnily arranged for the people in Salt Lake City to not

Ex. 9

Page 137 continued, (Plaintiff's examination of Mr. Rucker)

require wide area network access after 4:30 mountain time, which would have been 3:30 your time, so you could do the experiments without interrupting people's service. But those experiments continued occasionally, and we occasionally had outages.

Page 138, lines 1-17 (Plaintiff's examination of Mr. Rucker)

Q. Are you aware---are you aware that Mr. James Finney was on the team—the I – you're call it the IDNX--- the Micro 20 project team?

A. I would not be aware of that. I hired Mr. Finney. I was the hiring official for Mr. Finney. My recollection was that Mr. Finney came to work at Salt Lake after the IDNX experiment. Now, whether the experiment continued longer than I was aware of, that's possible, but I do not recall Mr. Finney being on the team. I do not recall a team, frankly. I just remember dealing with you, Mr. Patrick.

Q. I have, could you name another project that you – we have worked together, if it's permitted?

A. Other projects we've worked together on, I was tangentially involved with the packet shaping. I've been aware of your work on other projects, but I believe the two that you and I were most connected with prior to the selection was IDNX.

Ex. 9

Page 140, lines 21-25, (Mr. Maloney's Cross-examination of Mr. Rucker)

Q. Well, did your interaction with Mr. Patrick leave you with a favorable or unfavorable impression?

A. Unfavorable, simply – the fact that the experiment ultimately didn't work wasn't a particularly unfavorable aspect, sometimes that's the outcome of experiments, but I wasn't happy at all with the attitude toward the staff. There just didn't seem to be any concern that we were dropping people off the network or inconveniencing people.

Page 158, (Mr. Maloney's direct examination of Mr. Rucker)

Q. In connection with you testimony about the IDNX project throwing Salt Lake off the line--

A. Yes.

Q. — that was true testimony?

A. That was true testimony.

Q. The communications you had on the subject, did they include communications with Mr. Finney?

A. I have no recollection of talking to Mr. Finney about IDNX at all, but I definitely had telephone conversations with Mr. Patrick.

Q. Were you technically involved in the IBNX [sic] project?

A. No. The IDNX project was being run out of

Ex. 9

Page 159, (Mr. Maloney's direct examination of Mr. Rucker

San Francisco, we were just on the end of the network. We were – not to be facetious, but we were the victims of the IDNX project. But I was not involving in actually testing it, no.

Page 159, lines 8-25) (Mr. Patrick, Plaintiff's cross examination of Mr. Rucker)

Q. Mr. Rucker, are you aware that the Micro 20 project initiated the process that eventually evolved into the national wide area network?

A. I am not. And I'm not sure I would say it that way.

Q. Are you aware that it was classified by senior management in telecommunications support as being tremendous success?

A. I certainly am not aware of that.

Q. Are our aware –

THE COURT: When you phase the question that way, by saying "are your aware," that assumes a fact that may not be in evidence. Strike that preamble and just ask the question, because you're not testifying now, you're asking questions. And when you ask a question, you shouldn't assume that something is in evidence when it is not in evidence.

MR. PATRICK: Thank you.

Q. BY MR. PATRICK: Was the Micro 2o project a major success?

Ex. 9

Page 160, lines, (Mr. Patrick, Plaintiff's cross examination of Mr. Rucker)

A. I would say no. It was a circuit-based switching technology that isn't used. We went to a packet based, IP based technology, and I'm not aware that the Micro 20 project contributed to that.

Q. Did the Micro 20 project lead to the VISN 15 project?

A. Not that I'm aware of at that time the VA was regionalized ant there were no VISNs.

Q. Did the Micro 20 project show that there was a potential of $22 million per year savings in costs for the entire VA?

A. I don't remember what cost projections were made. I couldn't answer the question.

MR PATRICK: That's all the questions I have, Your Honor.

Ex. 10

Page 19, lines 6-25 (Mr. Patrick, Plaintiff' direct examination of Ms. Seal the Human Resource Specialist)

Q. That's good.

Do you thin that it's possible for a selecting official to rate and rank an employee if that selection official didn't review or read the application, the selecting official, not – the person whose responsibility it is to make this final selection?

Ex. 10

Page 19, continued (Mr. Patrick, Plaintiff' direct examination of Ms. Seal the Human Resource Specialist)

A. The selection official would have to have – I would think that they would need informed information, and how they got that informed information, whether it is from the application or whether it would be from someone that they had charged with reviewing his applications.

Q. In your years of experience, do you think that it's more accurate for you simply to rely upon input from managers—I'm speaking form the perspective of the selection official – or is it a better policy to review the applications yourself'

A. I don't feel like – that I can answer that properly, because I just used that same procedure myself last week, You know, that's why you have deputies and that's why you have assistants, and you surely have to have faith in them,

Page 20, lines 1-4 (Mr. Patrick, Plaintiff' direct examination of Ms. Seal the Human Resource Specialist)

that they're going to give you accurate information, or to – and probably they're going to work with the employee—the selected employee as much or as more hat the selecting official. S, I – I don't' have any problems with that.

Ex. 10

Page 21, lines 4-25 (Mr. Patrick, Plaintiff' direct examination of Ms. Seal the Human Resource Specialist)

Q. Would you read that paragraph again, please, but this time if you would read the second sentence also.

THE COURT: What paragraph?

MR. PATRICK: The very last paragraph.

THE WITNESS: The first paragraph on page 9?

MR. PATRICK: That is correct.

THE COURT: What paragraph are you characterizing as the first paragraph? Is it at the top of the page?

MR. PATRICK: I'm sorry, at the bottom. I apologize. I lost my glasses that I need to read, It would be H.

THE WITNESS: H1?

MR. PATRICK: Yes

THE WITNESS: "The selecting official, who may be the chief of the service or subordinate supervisor designated in writing, would interview all candidates referred on the certificate. It a personal interview is impracticable due to distance or the extended absence of a candidate such as more than

Ex. 10

Page 21, continued (Mr. Patrick, Plaintiff' direct examination of Ms. Seal the Human Resource Specialist)

a week, the selecting official will review all available information about the candidate's qualifications and attempt to make contact by telephone. Selection should not be delayed by the unavailability of one or two candidates."

Q. BY MR. PATRICK: That phrase that states that the

Page 22, lines 1-25 (Mr. Patrick, Plaintiff' direct examination of Ms. Seal the Human Resource Specialist)

selecting official will review all available information, how do you interpret that? When it say "available information," does that mean to you information – feed – input from managers are available information, such as applications or other projects that a employee may have worked on or even written recommendations from past managers?

A. I think what it is refers to - when it's in the merit promotion plan, what it's referring to is the application package that we send with the certificate. And usually that application package involves – includes the application, the supplemental, where the candidate responds to the rating factors, and then anything else that the candidate submits as a part of that package. That's exactly what that's referring to.

Ex. 10

Page 22 continued (Mr. Patrick, Plaintiff' direct examination of Ms. Seal the Human Resource Specialist)

A. If the selecting official uses other sources, or other means for additional information, just like if she wanted to call the supervisors, or call the previous supervisors on a candidate or something, but what the merit promotion plan is referring to is the application package that was sent with the certificate,

Q. Thank you. So, you would agree that the application – my application, in particular, was part of that application package?

A. I'm sorry, I didn't –

Q. My application specifically was part of that

Page 23, lines 1-23 (Mr. Patrick, Plaintiff' direct examination of Ms. Seal the Human Resource Specialist)

application package that went forward to the selecting official; is that correct? To the selecting official.

A. Yes. Everything that was submitted by the candidates was referred to the selecting official in their package, yes, sir.

Ex. 10

Page 23 continued (Mr. Patrick, Plaintiff' direct examination of Ms. Seal the Human Resource Specialist)

Q. So, this statement is referring to the – is technically saying, in general terms, that the selecting official should have read that package or should have read my application, is what I'm concerned about, reviewed?

A. As I said before, they should review it or be confident in their staff that they're getting informed decisions from them. You know, sometimes a supervisor can't – or a selecting official, you know, just has so much—you know, she has – they would have to delegate, and this was a case that I thing was probably delegated.

Q. And I understand what you're saying, but just to be clear about what the merit promotion plan says, the merit promotion plan, as you see it written, does say that the selecting official will review all of the available information and, as you have stated, that available information would include the application package; is that a yes or no?

A. Yes.

Ex. 11

Page 10, lines 3-25 (Mr. Patrick, Plaintiff' direct examination of Ms. Belles the selecting official)

A. I didn't read any of the applications. I depended on John Rucker and Ron Klavohn's experience and knowledge, and the fact that they read all of the applications, to make that recommendation to me.

Q. Going back to the requirement based upon the merit promotion plan, is it not your responsibility as the selecting official to review all of the material?

A. We already established that, didn't we? I indicated that, yes, that's what it says here in the policy.

Q. Okay. But you chose not to read all of the applications, even though you knew the background of the other candidates; is that correct.

A. I didn't read – yes, you're correct, I did not read any of the paperwork that came along with the certificate of applicants.

Q. But you knew the background of the other candidates, is what I'm getting at. I just want to make sure –

A. I knew Jerry Taylor and Larry Wiginton, yes. I knew the jobs they worked in. I was familiar with them because I had interaction with them in the organization.

Ex. 11

Page 10 continued (Mr. Patrick, Plaintiff' direct examination of Ms. Belles the selecting official)

Q. Do you fell that had you read my application that you could have learned more about my background?

A. Well, if I read all of the applications, I could

Page 11, lines 1 - 13 (Mr. Patrick, Plaintiff' direct examination of Ms. Belles the selecting official)
probably have learned more about any of their backgrounds, yes

Q. Sorry to interrupt.

A. -- that is accurate.

Q. I'm specifically referring to just my application.

A. Right. That would hold true in yours as well.

Q. So, is that a yes or no?

A. Yes.

Q. Okay. But again, you chose not to do that?

A. That's correct.

Page 16, lines 8-25 (Mr. Patrick, Plaintiff' direct examination of Ms. Belles the selecting official)

Q. Would you please read the Court that very brief paragraph?

Ex. 11

Page 16 continued (Mr. Patrick, Plaintiff' direct examination of Ms. Belles the selecting official)

A. "The selecting official, who may be the chief of the service or a subordinate supervisor designated in writing, should interview all candidates referred on the certificate. If a personal interview is impracticable due to distance or the extended absence of a candidate that is more than a week, the selecting official will review all available information about the candidate's qualifications and attempt to make contact by telephone. Selection should not be delayed by the unavailability of one or two candidates."

Q. Okay. So, would you agree that basically that statement is saying that if the candidates --- if it's not convenient to get the candidates together for a face-to-face interview that they would be contacted by telephone?

A. That's what this says. My understanding has always been that you do not have to conduct interviews. If you do conduct interview, you have to conduct interviews with all

Page 17, lines 1-13 (Mr. Patrick, Plaintiff' direct examination of Ms. Belles the selecting official)

applicants.

Q. Ms. Belles, I don't know if this is proper or not, but I think that a lot of these questions might just require a yes or no, I think we could get through the process much faster. And I'm sure there are going to be times whey you're going to

Ex. 11

Page 16 continued (Mr. Patrick, Plaintiff' direct examination of Ms. Belles the selecting official)

want to follow up with a response, and that's great, but I think some of these questions would require just yes or no.

Now, did you make any attempt to reach me by telephone?

A. No, I did not.

Q. Did you conduct any interviews for the position?

A. No. I did not.

Page 18 lines 6-25 (Mr. Patrick, Plaintiff' direct examination of Ms. Belles the selecting official)

Q. BY MR. PATRICK: Do you think that you could have learned more about my background if you had contacted me by telephone?

A. I would have been asking questions regarding your background and the evaluation factors of the position.

Q. Is that yes or no?

A. Yes.

Q. Do you think that – is it appropriate not to follow the local merit promotion plan?

Ex. 11

Page 18, continued (Mr. Patrick, Plaintiff' direct examination of Ms. Belles the selecting official)

A. All managers have to follow the merit promotion plan. There is a question about whether we were –

Q. I think we can – yes or no might just be appropriate, I believe.

A. All managers have to follow the merit promotion plan.

Q. Okay. Now, since all managers have to follow the merit promotion plan, is it in violation of that plan if you don't follow it?

A. Can you repeat that?

Q. If you don't follow the merit promotion plan, have you violated the regulations cited in the merit promotion plan?

Page 19, lines 1-5 (Mr. Patrick, Plaintiff' direct examination of Ms. Belles the selecting official)

A. I would say yes.

Q. And you have testified that you are very aware of your responsibilities in accordance with the merit promotion plan?

A. I was – I had an understanding about my responsibilities under the plan.

Q. Thank you. I'm going to go to another

Ex. 11

Page 23, lines 4-25 (Mr. Patrick, Plaintiff' direct examination of Ms. Belles the selecting official)

Q. BY MR. PATRICK: Ms. Belles, could we please go back. And this time we – to the very first one, on the first page, the very first item, lead computer specialist, GS-14. Now, in that particular position, there were how may people who applied for the position?

A. Three

Q. Okay. Now, that was the position that I applied for; is that correct?

A. Yes.

Q. And there were no interviews: is that correct?

A. That's correct.

Q. The third item on that same page, program manager officer, how many people applied for that particular position?

A. Three.

Q. Now, were there interviews held?

A. Yes, there were.

Q. Okay. How were they held? Were they held face-to-face or were they held by telephone?

A. They were held face-to-face with myself and Dave Albinson, who was the chief information officer at the time, in his office in Washington, D.C.

Ex. 11

Page 24, lines 1-11 (Mr. Patrick, Plaintiff' direct examination of Ms. Belles the selecting official)

Q. Okay. The next item --

A. Can I just add that the program manager – management officer was a direct report to me, so it was important that I conduct those interviews with the people who I needed to work directly with.

Q. But the question is that you did hold interviews; is that correct?

A. Yes, we did.

Q. Okay. And the very last one, the supervisor computer specialist, did you hold interviews for that positions?

A. Yes, we did.

Ex. 12

Page 153, lines 16-25 (Mr. Patrick, Plaintiff direct examination of Mr. Finney)

BY MR. PATRICK:

Q. Mr. Finney, was Mr. John Rucker involved with the Micro 20 IDNX project?

A. No.

Q. Were you involved with the Micro 20 IDNX project?

A. Yes.

Q. I think this should be the last question, but could

Page 154, lines 1-17 (Mr. Patrick, Plaintiff direct examination of Mr. Finney)

Q. you name the people who were involved with the Micro 20 project?

A. Lester Patrick, myself, and Don Wilson.

Q. Thank you. Was Mr. John Rucker involved with the package shaper project?

A. No.

Q. Was Mr. Ron Klavohn involved with the packer shaper project?

A. No.

Ex. 12

Q. Were you involved with the packet shaper project?

Q. Yes.

Q. Were you the coordinator in Salt Lake City in that region for the – sorry, I lost my train of thought – packet shaper project?

A. Yes

MR. PATRICK: Thank you, that's all the questions I have.

Page 157, lines 2-25 (Mr. Patrick, Plaintiff' redirect examination of Mr. Finney)

BY MR. PATRICK:

Q. Mr. Finney, are you aware of any negative impact on the network that was caused by the packet shaper project?

A. No. Just other than I mentioned, the reports.

Q. Right. Is it pretty common for reports like that to surface any time any new change is made to the wide area network?

A. Yes. I – I paused because I wanted to elaborate, and maybe I didn't make myself clear. If I can elaborate?

Ex. 12

THE COURT: I'm not sure, sir. You're looking at me. He asked you a question. I didn't ask you a question. If you've answered his question, then you're done. I f you haven't answered his question, then you should answer his question.

THE WINTESS: Okay, You've got to understand the packet shaper, When you say positive, negative, packet shaper was prioritizing traffic, negative, packet shaper was prioritizing traffic. So, if, for example, web traffic versus e-mail traffic is -- may be slower, but you have to look at the perspective from the different types of traffic, and how it's prioritized, and during that time all traffic was prioritized with the same weight.

MR. PATRICK: That's a fair answer. I don't have any further question.

Ex. 49

N.E.T
TRAININF AND EDUCATION
DEPARTMENT

CERTIFICATE OF COMPLETION

AWARDED TO:

JAMES FINNEY

IN RECOGNITIONOF SUCCESSFUL
COMPLETIONOF NETWORK EQUIPMENT
TECHNOLOGIES' PRESCRIBE COURSE IN:

IDNX /90/70/20 Operations
December 05-09, 1994

Larry Telles
Instructor

Eward Geirl
Director, Technical Training

Ex. 48

Subj: Micro 20 Training [#277065] 10 Nov 94 12:07 PST 7 lines
From:
Page 1

As a reminder to all persons attending the IDNX – Mircro-20 training, you will need to give Ed Prosser an estimate of travel cost. Please respond to this message with the estimate amounts. The training will take place from 12-5-94 through 12-9-94 in Redwood City, Ca. You should be receiving a package from the company with information about the class and the local area. II will fax to each of you today, a list of hotels, etc.

Subj: Micro 20 Training [#277065] 10 Nov 94 12:07 PST 7 lines

From:
recipients) Confirmation requested.

RUCKER, JOHN Last read: 16 Nov 94 14:51
[First read: 16 Nov 94 14:51]
Forwarded by: FINNEY, JAMES 16 Nov 94 14:41
FINNEY, JAMES Last read: 03 Aug 05 16:46
[First read: 16 Nov 94 14:40]
Forwarded on: 16 NOV 1994 13:50:40

Ex. 45

FINNEY, JAMES Z 1902-2100 DUTY STATION 101C T&L: 563

LAST PP: 12 SERVICE RECORD SCREEN PAGE 1

OCCUPATION SERIES & TITLE....221001
PAY PLAN.....GS/CA/SL/GW
OCCUPATON SERIES CODE 2210
GRADE.....13
POSITION NUMBER 30983A
ASSIGNMENT .....OTHER
COMPETITIVE LEVEL.....X09
DUTY BASIS.....FULL-TIME
NORMAL HOURS.....80.00
PAY BASIS.....PER ANNUM
PAY RATE DETERMINANT...REGULAR RATE
FLSA.....EXEMPT (NOT COVERED)
LABOR DIS CODE-1 COST CTR/ORG..19:2100

FINNEY, JAMES Z 1902:2100 DUTY STATION:101C T&L: 563

LAST PP: 12 SERVICE RECORD SCREEN PAGE 2

Ex. 45

TYPE OF APPOINTMENT.....CAREER
SUPERVISORY LEVEL.....0
BUS.....INELIGIBLE
SEX.....MALE
CITIZENSHIP.....U.S CITIZEN
VETERENAS PREFERENCE .....NONE
PERF/PROFCY RATING CODE....Fully Successful
SERVICE OMPUTATION DAE ...JAN 11, 1988

JINNEY, JAMES Z 1902:2100 DUTY
STATION 101C T&L: 563

LAST PP: 12 SERVICE RECORD SCREEN
PAGE 3
STATION EOD.....AUG 23, 1992

Ex. 13

FILED

MAY 02 2008

MOLYLY C DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATS COURT OF APPEALS

FOR THE NINTH CIRCUIT

LESTER E. PATRICK — NO.05-16984

PLAINTIFF – Appellant, — D.C. No. CV-03-02571-GEB

v. — **MEMORANDUM***

DEPARTMENT OF VATERANS AFFAIRS,

Defendant – Appelle — **ORDER**

Appeal from the United States District Court for the Eastern District of California
Garland E. Burrell, Chief Judge, Presiding

Submitted April 22, 2008**

Before: GRABER, FISHER, AND BERZON, Circuit Judges.

Ex. 13

Lester E. Patrick appeals pro e from the district court's order denying his motion for a new trial following a jury verdict in favor of the Department of _____

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument See Fed. R. App.P.34(a)(2).

05-16984

Veteran Affairs, in his action alleging race discrimination in a promotion decision. We have jurisdiction under 28 U.S.C. $ 1291. We review for abuse of discretion the denial of a motion for a new trial, Aanghvi v. City of Claremont, 328 F.3d 532, 536 (9th Cir. 2003), and we affirm.

Patrick contends that he is entitled to a new trial because the verdict was based on perjured testimony and there were numerous inconsistencies in the testimony offered by defendant. Patrick failed to raise many of these issues before the district court, and therefore waived them on appeal. See A-1 Ambulance Service, Inc. v. County of Monterey, 90 F.3d 333, 338 (9th Cir, 1996). To the extent Patrick did not waive, his contentions fail because credibility is an issue for the jury and is not generally subject to appellate review. See Murray v. Laborers Union Local No. 324, 55 F.3d 1445, 1452 (9th Cir. 1995) ("The credibility of witnesses and the weight of the evidence are issues for the jury and are not subject to appellate review.")

Patrick contends that the evidence in his favor outweighed the verdict, but he failed to address the evidence in support of defendant's arguments. The district court did not abuse its discretion when it found that the verdict was not against the weight of the evidence. See Desrosiers v. Flight Intern. of Florida Inc., 156 F. 3d 952, 957 (9th Cir. 1988) ("[W]e reverse for a clear abuse of discretion only where there is an absolute absence of evidence to support the jury's verdict.")

Patrick contends that the jury was not properly charged, but he failed to object to the instructions before the jury retired. See Grosvenor Props. Ltd. v. Southmark Corp., 896 F.2d 1149, 1152 (9th Cir. 1990)("Federal Rule of Civil Procedure 51 states that no party specifically objects to that instruction before the jury retires.").

Patrick's remaining contentions, including those regarding alleged juror confusion, the brevity of the deliberations, and entitlement to a 12-member jury, are not persuasive.

AFFIRMED.

Ex. 7

FILED
JUN 12 2008

MOLYLY C DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATS COURT OF APPEALS

FOR THE NINTH CIRCUIT

LESTER E. PATRICK — NO.05-16984

PLAINTIFF – Appellant,

v.

D.C. No. CV-03-02571-GEB

EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO

DEPARTMENT OF VATERANS AFFAIRS,

Defendant – Appellee.

ORDER

Before: GRABER, FISHER, AND BERZON, Circuit Judges.

We grant Appellant's motion for an extension of time to file a petition for a rehearing. The petition is now due no later than Monday, July 14, 208

Ex.

FILED
SEP 04 2008

MOLYLY C DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATS COURT OF APPEALS

FOR THE NINTH CIRCUIT

LESTER E. PATRICK	NO.05-16984
PLAINTIFF – Appellant,	D.C. No. CV-03-02571-GEB
v.	EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO
DEPARTMENT OF VATERANS AFFAIRS,	**MANDATE**
Defendant – Appellee.	

The judgment of this Court, entered 5/2/08, takes affect this date.

This constitutes the formal mandate of this Court issued pursuant to a Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

By: Lee
Deputy

FILED

AUG 27 2008

MOLYLY C DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATS COURT OF APPEALS

FOR THE NINTH CIRCUIT

LESTER E. PATRICK

PLAINTIFF – Appellant,

v.

DEPARTMENT OF VATERANS AFFAIRS,

Defendant – Appellee.

NO.05-16984

D.C. No. CV-03-02571-GEB

EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO

ORDER

Before: GRABER, FISHER, AND BERZON, Circuit Judges.

The petition for panel rehearing is denied.

Ex. 5

FILED
OCT - 6 2005

CLERK OF DISTRICT COURT
EASTERN DISTRICT OF
CALIFORNIA

Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court

United States District Court for the Eastern District of California

File Number 03cv-02571-GEB-JFM

Lester Patrick)
)
)
v.)
) **Notice of Appeal**
)
R. James Nicholson, Secretary
Department of Veteran Affairs

Notice is hereby given that Lester Patrick, plaintiff in the above named case, hereby appeal to the United States Court of Appeals for the 9th Circuit, "Motion for a New Trial" from an order by Judge Garland E. Burrell Jr., denying plaintiff's motion for a new trial entered in this action on the 9th day of Aug, 2005.

Pro Se: Lester Patrick
Address: 9522 Bismark Place
Stockton, Ca. 95209

Ex. 2

FILED
JUN 20 2005

CLERK OF DISTRICT COURT
EASTERN DISTRICT OF
CALIFORNIA
By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV NO. S-03-02571-GEB-JFM PS

Lester Patrick)
Plaintiff,)
)
v.)
) SPECIAL VERDICT
)
ANTHONY J. PRINCIPI,
Secretary Department
of Veteran Affairs
Defendant

We the jury find the following:

QUESTION 1:

Has Plaintiff proved by a preponderance of the evidence that plaintiff's race was a motivating factor for Defendant's decision to not promote him?

Ex. 2

Answer

___	_X__
Yes	No

If the answer to question 1 is 'no,' do not answer any further questions. If the answer to Question 1 is "yes," proceed to Question 2.

QUESTION 2:

Has Defendant proved by a preponderance of the evidence that Defendant's decision to not promote Plaintiff was also motivated by a lawful reason?

ANSWER:

___	___
Yes	No

If the answer to question 2 is 'no,' proceed to Question 4. If the answer to Question 2 is "yes," proceed to Question 3.

QUESTION 3

Has Defendant proved by a preponderance of the evidence that Defendant would have made the same decision to not promote Plaintiff even if Plaintiff's race had played no role in Defendant's decision to not promote Plaintiff?

Ex. 2

Answer:

____ ____
Yes No

If the answer to question 3 is 'yes,' do not answer any further questions. If the answer to Question 3 is "no," proceed to Question 4.

QUESTION 4:

What amount of money will reasonably and fairly compensate Plaintiff for the injury you have found was caused by Defendant?

ANSWER:

$_____

DATED: 6-16-05 MICHAEL DURMER
FOREPERSON

Ex. 4

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV NO. S-03-02571-GEB-JFM PS

Lester Patrick
Plaintiff,

v.

ANTHONY J. PRINCIPI,
Secretary Department
of Veteran Affairs
Defendant

ORDER

Plaintiff moves for a new trial under Federal Rule of Civil Procedure 59, contending that "[t[he jury's verdict went against the clear weight of the evidence"; "[t[he witnesses were not creditable" since they made numerous contradictory statements; "[t]he jury did not follow the instructions of the judge" to consider and discuss all evidence since the jury reached a verdict within between 15 and 20 minutes; and "[t]he jury was confused about direct evidence and circumstantial evidence, "as evidenced by

---

one juror's statement to Plaintiff that there was no direct evidence of discrimination. (Pl.'s Mot. At 20-17.) Defendant opposes the motion, arguing that the verdict was not contrary to the clear weight of the evidence, a quick verdict is not evidence of a failure to deliberate, and there is no evidence of juror misconduct. (Def.'s Opp'n at 4-20.)

Ex. 4

Under Federal Rule of Civil Procedure 59(a), "[t]he trial judge [has] discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence." Gasperini v Ctr. For Humanities, Inc., 518 U.S. 415, 433 (1996) (internal quotation marks omitted). "[A] stringent standard applies when the motion is based on insufficiency of the evidence." Venegas v. Wagner, 831 F. ed 1514, 1519 (9th Cir. 1987). The district court must find "that the jury's verdict is against the great weight of the evidence, or it is quote clear that the jury has reached a seriously erroneous result." Ace v. Aetna Life Ins. Co., 139 F. 3d 1241, 1248 (9th Cir. 1998). If the evidence at trial was "substantially balanced," the motion should be denied. Roy v. Volkswagen of Am., Inc., 986 F. 2d 1174 (9th Cir. 1990).

Since the verdict was not against the weight of the evidence, Plaintiff's motion is denied.

IT IS SO ORDERED.

DATED: August 19, 2005

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR
United States District Judge

Ex. 14

THE SECRETARY OF VETERAN'S AFFAIRS

WASHINGTON
October 10, 2003

MEMORANDUM FOR UNDER SECRETARIES, ASSISTANT SECRETARIES, OTHER KEY OFFICIALS, AND FIELD FACILITY DIRECTORS

SUBJECT: Employment and Advancement of Women, Minorities and People with Disabilities

Our mission is to serve America's veterans and their families with dignity and compassion. As their principal advocate, we must ensure that they receive medical care, benefits, social support, and lasting memorials that promote the health, welfare, and dignity of all veterans in recognition of their service to our Nation. To accomplish these responsibilities, we must have a high performing diverse workforce that is inclusive of all Department of Veterans Affairs employees.

Of the Cabinet-level Departments, VA has an impressive representation of women, minorities, and people with disabilities, However, we must do more to improve that representation at the GS-13 through the Senior Executive Service levels, Each of you has a direct responsibility to assure that your organization and workplace reflect the rich diversity of America and our veterans.

The most important, single factor in attracting and retaining women, minorities and people with disabilities is direct, conscientious involvement by all managers, Managers can identify where

Ex. 14

external targeted recruiting efforts will best succeed sand stimulate interest in VA cares, We should also ensure that we take advantage of the very talented pool of employees within the Department from which we can draw, such as nurses and nurse executives and other professional fields. Leveraging our in-house talent enhances our ability to retain exceptional employees and provide them opportunity for continual growth.

VA managers must compete for the best and brightest employees, who are precisely the people we need to serve veterans, I have identified several initiatives below, I expect full cooperation from each of you in support of these efforts as we reach out tow women, minorities, and people with disabilities, The initiatives include:

Partnering with the Office of Personnel Management on its initiative to improve the representation and the career development of underrepresented groups;

Memorandum for Under Secretaries, Assistant Secretaries, Other Key Officials, and Field Facility Directors.

Working with professional organizations to enhance VA's ability to recruit and retain highly-skilled and qualified women, minorities, and people with disabilities and prepare them to be future VA executives;

Identifying ways to publicize and recognize accomplishments ·

Ex. 14

Conducting a survey and focus groups with women, minorities, and people with disabilities; and

Ensuring the development and implementation of mentoring programs.

I have already taken steps to address the concerns of women in the Department. I commissioned a Task Force, comprised of women executives in Central Office and the field, to develop a comprehensive plan addressing the needs of women in the Department and to make recommendations to me on enhancing representation of women at the GS-13 and above grade levels, The Task Force completed its work. The report contains strategies for success that will move VA into a position of leadership in the employment and advancement of women. Additionally, I directed the expansion of the Women's Executive Leadership Forum to include women from VA field facilities.

Likewise, steps will be taken to focus on the address issues pertaining to the underrepresentation of minorities and people with disabilities in GS-13 and above positions. I expect your support in identifying causes and solutions.

I am holding each of you accountable for ensuring that you leverage diversity in your respective organization. It you have any questions or need additional information, please contact Mr. William H. Campbell, Acting Assistant Secretary for Human Resources and Administration, at) 202) 273-4901.

/s/ Anthony J. Principi

Department of Veteran Affairs Memorandum

Date: June 13, 2000

TO: Director, ACIO for Customer Service

SUBJ: Lead Computer Specialist, GS-334-14
(Telecommunications/WAN Management)
Vacancy Announcement No. 107-00

1. The candidates listed below are eligible for promotion to the above position and are referred to you for consideration, in accordance with our Merit Promotion Plan. The application packages, as submitted, are attached for your consideration.

APPLICANTS	Present Position
Lester Patrick	Telecommunications Specialist GS-13 VAMC, Martinsburg, (DL-San Francisco)
Jerry D. Taylor	Computer Specialist GS-334-13 VAMC, Washington, DC
Larry Wiginton	Computer Specialist GS-334-13

2. Please complete the endorsement below indication your action, and return this certificate by June 27, 2000.

/s/ DEBORAH C. SEAL

Attachment (s)

s and Operations Service

X I have selected Jerry Taylor
X I would to have he position filled on ASSAP.
Date: June 16, 2000

X I have complied with our merit promotion plan requirements concerning interviews.

/s/ Gail Belles

BEST AVAILABLE COPY

Ex. 18

SUMAMRY OF MERIT PROMOTION ACTIVITIES FOR SELECTING OFFICIAL JUNE 1998 – JUNE 2000

Case No. 2000O-703
Complainant: Lester E. Patrick

Name of position: Supervisory Computer Specialist
Vacancy Announcement date and number: 8/13/98; 144-98
Series and Grade: GS-334-15
Date of Selection: 9/29/98 (Promotion effective 10/11/98) Name EEO Category (race) of selecting official: Gail Belles, Caucasian
Name and EEO category (race) of selectee: John Rucker, Caucasian
Breakdown of all applicants based on EEO category: Five applicants were interviewed (some via phone): it is not feasible to determine racial background during interviewing and has never been a factor in hiring.

Name of position: Program Management Officer
Vacancy Announcement date and number: April 1999; VHA 99-107
Series and Grade: GS-340-15
Date of Selection: 6/17/99 (Promotion effective 10/11/98)
Name EEO Category (race) of selecting official: Gail Belles, Caucasian
Name and EEO category (race) of selectees: Gary Baker; Caucasian
Breakdown of all applicants based on EEO category: Three applicants were interviewed; however, it is not feasible to determine racial background during interviewing and has never been a factor in hiring.

Ex. 18

Name of position: Lead Computer Specialist
Vacancy Announcement date and number: 5/16/00; 109-00
Series and Grade: GS-334-14
Date of Selection: 6/16/2000 (Promotion effective 10/11/98)
Name EEO Category (race) of selecting official: Gail Belles, Caucasian
Name and EEO category (race) of selectee: Mathew Canavan, Caucasian
Breakdown of all applicants based on EEO category: Unknown – Selection was made without interviewing applicants.

Ex. 16

Excerpt From Plaintiff's Response to Defendant's Opposition to a New Trial (page 14)

Mr. Rucker testified that he hired Mr. Finney and that Mr. Finney could not have been involved with the Micro-20 Project because he hired him after the Micro-20 Project was completed. At the time of the trial, it was not possible for plaintiff to disprove Mr. Rucker's testimony of when James Finney was hired because plaintiff simply didn't have that information available.

Since the trial plaintiff has obtained an excerpt from Mr. Finney's service record that shows that **Mr. Rucker hired Mr. Finney on Aug 23, 1992.** This can be seen in the attached exhibit 45, last line – Station EOD.....AUG 23, 1992. **The Micro-20 Project started around April of 1994 and ended on or around March of 1995.** Plaintiff completed and distributed the final report on or around June, 1995. **Mr. Finney had been hired by Mr. Rucker about two years prior to the Micro-20 Project starting.**

Excerpt From Plaintiff's Rehearing Brief to Ninth Circuit Court of Appeals

UNITED STATES COURT OF APPEARLS FOR THE NINETH COMCUIT

CASE NO. No. 05-16984 (9th Cir)
No. 2:03-CV-02571-GEB

Ex. 16

Lester E. Patrick

Plaintiff – Appellant,

Vs.

Department of Veteran Affairs,

Defendant – Appellee.

APPELLANT'S OR PETITIONER'S INFORMAL BRIEF FOR PETITION FOR PANEL REHEARING

Statement of Counsel (Pro se)

In the judgment of Plaintiff, this petition addresses three situations in the "purpose" section.

The following points will be raised;

1. There was a material fact or law that Plaintiff believes was overlooked in the decision. Specially, Plaintiff has identified new evidence after the district court hearing that proves the defendant's critical witness gave false testimony under oath. This testimony lead to the jury making a judgment based upon false testimony. Without this testimony the defendant would not have obtained a ruling in his favor. The Supreme Court has ruled in Giglio that if false testimony could have affected the judgment of the jury, then a new trial is required.

123

(2)

FILED

FEB 17 2009

OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO: 08-727

IN THE SUPREME COURT OF THE UNITED STATES

Lester Patrick

V.

James B Peake, M.D. Secretary
United States Department of Veteran Affairs

Bobbie Montoya

On Rehearing of Petition for Writ of Certiorari
To The Ninth Circuit of Appeals

Lester Patrick
9522 Bismark Place
Stockton, Ca. 95209
209-957-2937

QUESTIONS PRESENTED

The McDonnell Douglas model when applied to desperate treatment cases requires an agency to articulate a legitimate and nondiscriminatory reason for its actions in cases whereby discrimination is alleged. The Department of Veteran Affairs has articulated a reason for its actions in this case; but when tested against the McDonnell Douglas model the legitimate nondiscriminatory reason doesn't hold up.

Due to the judgment of the district court and the 9th Circuit Court of Appeals there are two critical questions stemming from this case that still need to be answered by the Supreme Court.

The following questions are being presented to the Court for clarification.

1. Whether the district court is required to give the jury instructions concerning pretext in discrimination cases?

2. Is a federal employee required to provide additional evidence of discrimination when the agency's proffered reason involves a procedure that violates employment regulations established for federal agencies?

PARTIES TO THE PRECEEDING

Petitioner is Lester Patrick. He is plaintiff in the District Court and the appeallee in the Court of Appeals. Plaintiff brings this action on his own behalf.

Respondents are Dan Maloney, who defended the case in District Court, and Bobbie J. Montoya who defended the case in the Court of Appeals.

TABLE OF CONTENTS

Page

Questions presented.....i

Patties to the proceeding..... ii

Table of authorities.....vi

Motion for Rehearing.....1

Jurisdiction.....1

Constitutional and statutory provisions involved.....1

Grounds for Rehearing.....2

I. Factual background.....4
A. Plaintiff.....3

B. Disparate Treatment Claims.....3
Plaintiff's Prima Facie Case.....4

II. Reasons for Granting the Writ.....6

The Supreme Court on Pretext.....10

Appeals Court Split on Pretext.....12

Conclusion.....1

Exhibit 15.....15

TABLE OF AUTHORITIES

	Page
McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973)	3
Gay v. Waiters' Union, 694 F.2d 531, 538 (9th Cir. 1982	3
St. Mary's Honor Ctr. V Hicks, 509 U.S. 502, 507 08(1993).	4
Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185, 1196 (9th Cir.2003) (quoting Burdine., 450 U.S. at 256).	4
Fodwin v. Hunt Wesson Inc. 150 F.3d 1217, 1221-22 (9th Cir. 1998);	4
Stegall v. Citadel Broadcasting Co. 350 F.3d 1061 (9th Cir. 203)	4
McGinest v GTE Service Corp., 360 F3d 1103, 1122 (9th Cir. 2004)	4
Costa v. Desert Palace, 539 U.S. 90, 123 S. Ct. 2148 (2003)	4
Board of trustees of Keene State College, et al., v. Sweeny, 439 U.S. 24 (1978).	5

MOTION FOR REHEARI NG OF PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a rehearing of his writ of certiorari to review the judgment of the United States of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the Ninth Circuit Court of Appeals at Ex. 13. The decision of the District Court is reported at (Ex. 4) Decision of United States Supreme Court at (Ex. X)

JURISDICTION

The judgment of the Court of Appeals was entered on Aug. 27, 2008. (Ex. 8). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The judgment of the Supreme Court was entered on Jan. 21, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Title VII of the Civil Rights Act of 1964, Civil Rights Act of 1964 SEC. 2000e-2. *[Section*

2 Civil Rights Act of 1866, United States Code, .Title 42, § 1982;

GROUNDS FOR REHEARING

This rehearing is being requested on the grounds that the Supreme Court has ruled that courts must instruct jurors that if they disbelieve an employer's explanation they may-but need not-infer that the employer's true, motive was discriminatory. The district court in plaintiff's case failed to instruct the jury on this instruction as required.

Nationally, the district courts are split on this issue and requires a ruling from the Supreme Court on whether it is mandatory for courts to give instructions on pretext.

Plaintiff is also requesting a rehearing on the grounds that the defendant never presented a legitimate nondiscriminatory reason to address its unexplained actions that gave rise to this complaint. Accordingly, plaintiff should not have been required to give additional evidence to disprove defendant's articulated nondiscriminatory reasons.

This case present two questions. One asks "whether the district court is required to give the jury an instruction concerning pretext in a discrimination case"

A second question asks if an employee in a race discrimination case is required to provide additional evidence of discrimination when the agency's proffered reason involves a procedure that clearly violates its own internal policies and federal employment regulations governing promotion procedures for federal agencies?

I. Factual Background

A. Plaintiff

Plaintiff is a civilian GS-13 Telecommunications Specialist for the Department of Veteran Affairs, who filed a suit, in pro se, under Title VII, 42 U.S.C. § 2000e-16, alleging that the VA discriminated against him when he was not selected and promoted to a GS-14 Lead Computer Specialist.

B. Disparate Treatment Claims

Disparate Treatment

Disparate treatment claims must proceed in accordance with the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny. A discrimination complainant must first establish a prima facie case of disparate treatment. In general, a plaintiff must present evidence of "actions taken by the employer from which one can infer, if such actions remain unexplained , that it is more likely than not that such action was based upon race or another impermissible criterion." Gay v. Waiters' Union, 694 F.2d 531, 538 (9th Cir. 1982) (citation and internal quotation marks omitted).

Upon these showings, the burden shifts to the defendant to produce some evidence demonstrating a legitimate, nondiscriminatory reason for the employee's termination. McDonnell Douglas, 411 U.S. at 802. If the defendant meets this burden of production, any presumption that the defendant discriminated "drops from the case,"

and the plaintiff must then show that the defendant's alleged reason for termination was merely a pretext for discrimination. St. Mary's Honor Ctr. V Hicks, 509 U.S. 502, 507 08(1993). However, the burden of persuasion, as opposed to production, remains with the plaintiff at all times Id. at 511.

A plaintiff may prove pretext' either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' " Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185, 1196 (9th Cir.2003) (quoting Burdine., 450 U.S. at 256).

The evidence proffered can be circumstantial or direct. Fodwin v. Hunt Wesson Inc. 150 F.3d 1217, 1221-22 (9th Cir. 1998); Stegall v. Citadel Broadcasting Co. 350 F.3d 1061 (9th Cir. 203). In disparate treatment case, the plaintiff'must show the employer's intent to discriminate, but intent may be inferred from circumstantial evidence." McGinest v GTE Service Corp., 360 F3d 1103, 1122 (9th Cir. 2004)(citation omotted). Circumstantial and direct evidence should be treated alike. Costa v. Desert Palace, 539 U.S. 90, 123 S. Ct. 2148 (2003). :Circumstantial evidence is not sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Costa, at 2154 (quoting Rogers v. Missouri Pacific R.R. Co. 342 U.S. 500, 508 n.17 (1957).

Plaintiff's Prima Facie Case

Both the Defense and the EEOC agrees that plaintiff has established a prima facie case as follows:

Burden Shifts to Defendant

The burden now shifts to the defendant to demonstrate that it had legitimate nondiscriminatory reasons for selecting Jerry Taylor over the plaintiff.

The defendant articulated several legitimate nondiscriminatory reasons:

The Supreme Court has held that it is sufficient for an employer to simply articulate its "legitimate, nondiscriminatory reason' for the hiring decision in order to rebut plaintiff's prima facie case. Board of trustees of Keene State College, et al., v. Sweeny, 439 U.S. 24 (1978).

Evidence of Pretext

Plaintiff must show that the defendant's alleged reason for termination was merely a pretext for discrimination. St. Mary's Honor Ctr., 509, U.S. at 507-08. "Plaintiff may prove pretext either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that he employer's proffered explanation is unworthy of credence." Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185, 1196 (9th Cir.2003) (quoting Burdine, 450 U.S. at 256). McDonnell Douglas requires that plaintiff raise a genuine factual question whether, viewing the evidence in the light most favorable to plaintiff, defendant's proffered reasons are pretextual.

II. PROCEEDINGS BELOW

A. The United States Supreme Court

On Dec 16, 2008, plaintiff filed a writ of certiorari with the U.S. Supreme Court. On Jan 21, the motion was denied. **(Exhibit xx)**

B. Motion for Rehearing Before the Full Court

Because several questions surrounding the issue of this case are still unclear and the fact that these questions when answered will have a major impact on employees nationally, plaintiff is requesting a rehearing before the full court.

REASONS FOR GRANTING THE WRIT

The Supreme Court has failed to address the question of whether to mandate a pretext instruction. The pretext instruction represents a unique issue because it describes a permissible inference rather than an obligatory inference.

In civil litigation, courts generally follow the rule that a judge need not instruct the jury on permissible inferences because the average trial contains a virtually unlimited number of possible inferences that the jury may draw from any given piece of evidence.

In most employment discrimination cases in which issues of pretext arise, the defendant will provide all sorts of seemingly legitimate reasons to justify its behavior while the plaintiff will fights to discredit these justifications and prove that the employer acted based on a discriminatory and impermissible motive. However, the plaintiff will rarely, if ever, ferret out any sort of "smoking gun" or affirmative evidence demonstrating

discrimination by the employer. Thus, creating an inference that the employer lied can give rise to the extremely important inference that the employer lied for a particular reason: to cover up a discriminatory purpose.

In addition to the significance of this particular issue, the sheer volume of employment discrimination cases on the federal docket and the need for national uniformity in the litigation of these disputes necessitates Supreme Court resolution of this circuit split.

Three United States courts of appeals have decided to require this jury instruction in employment discrimination cases involving a proof pattern described as the McDonnell Douglas tripartite formula. The Second, Third, and Tenth Circuits require the instruction at trial. Four other U.S. courts of appeals believe the instruction should not be mandatory. Within this group of four, the Seventh and Eleventh Circuits have decided not to require the instruction, while the First and Eighth Circuits have indicated in dicta that they doubt the necessity of the instruction.

There is urgent need for the Supreme Court to rule on whether courts should mandate an instruction on pretext to jurors.

The final step in the proof process represents the crux of the argument to mandate use of the pretext instruction.

Unless the court gives the instruction, a jury might make the same assumption that the Fifth Circuit did in Reeves and assume that the plaintiff must provide additional affirmative evidence beyond a showing of pretext in order to prevail.

The concern that the jury could misunderstand the law governing employment discrimination seems logical, especially after examining a sample instruction that lacks any reference to pretext, such as the one given by the district court in Townsend:

"In order for plaintiff to recover on [his Title VII] claim, he must prove by the preponderance of the evidence that defendant intentionally discriminated against plaintiff, that is, plaintiff's race must be proven to have been a motivating factor in defendant's decision regarding plaintiff's demotion.

It seems entirely plausible, if not probable, that "a rational juror might very well have interpreted such an instruction to require affirmative proof of discriminatory intent." Omission of the pretext instruction therefore creates the possibility that a jury could find for the defendant "because it believe[s] that the plaintiff could not prevail without affirmative evidence that his race was a motivating factor in the challenged employment actions."

The first question being submitted is, **"whether the district court is required to give jurors instructions concerning pretext** in discrimination cases?"

As stated above, in a disparate discrimination case the employee is required to establish a prima facie case of discrimination. The employee is required to present "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such action was based upon race or another impermissible criterion." Gay v. Waiters' Union, 694 F.2d 531, 538 (9th Cir. 1982) (citations and internal quotation marks omitted).

Once that burden has been met, the employer is required to give a legitimate non-discriminatory reason for its actions. The Department in this case has articulated a reason for its actions.

But the articulated reason in response to plaintiff's

prima facie case can never be a legitimate non-discriminatory reason simply because it never produced evidence that explains that the articulated reasons are the reasons for the actions taken. For example, stating that Jerry Taylor had extensive management background does not address why she didn't read plaintiff's application.

According to the McDonnell Douglas standard a plaintiff must present evidence of "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such action was based upon race or another impermissible criterion." Gay v. Waiters's Union, 694 F.32d 532, 538 (9th Cir. 1983) (citations and internal quotation marks omitted)In this case, the defendant never met the burden of demonstrating a legitimate, nondiscriminatory reason for its action. None of the reasons cited by the defendant for its actions explain why Ms Belles didn't read plaintiff's application.

Therefore plaintiff is not required to prove pretext. The second question for the Supreme Court is as follows: **"Is it a requirement that a federal employee provide additional evidence of discrimination when the agency's proffered reason involves a procedure that violates employment regulations established for federal agencies?"**

It is imperative that the court answer this question. Plaintiff submitted to the district court a proposed jury instruction on pretext. **(Exhibit xx)** The instruction was ignored. As a result plaintiff's case was prejudiced because of a lack of the instruction and the inclusion of the instruction that informed the jury that plaintiff was required to prove that he was not promoted because of his Race. (Exhibit xx)

Not including an instruction on pretext was definitely prejudicial because defendant was allowed to argue that plaintiff needed to show pretext but the jury wasn't given an instruction on pretext nor was plaintiff's instruction on pretext given to the jury.

Intentional discrimination has not been defined by the Supreme Court. Consequently jurors are left to figure it out for themselves. This creates a near impossible task for a plaintiff of a discrimination case. Without the instructions, jurors may conclude that a plaintiff cannot prevail by proving pretext alone. Especially when they are given an instruction that instructs them that the plaintiff can only prevail if he proved that the employee's actions are by Race.

THE SUPREME COURT ON PRETEXT

In 1993, the Court issued its opinion in St. Mary's Honor Center v. Hicks, a five to four decision that attempted to clarify some of the issues surrounding the role of pretext in the McDonnell Douglas framework. In Hicks, the Court considered the basic question of whether a plaintiff deserved judgment as a matter of law if the trier of fact disbelieved the employer's nondiscriminatory explanation.

The Court divided "pretext for discrimination" into two parts. To demonstrate pretext, the plaintiff must have "shown both that the reason was false, and that discrimination was the real reason. However the Court emphasized the permissibility of inferring the ultimate fact of discrimination solely from a false explanation by the defendant employer. Although proof of a false explanation by the defendant may therefore help significantly in

proving the employer lied to conceal a discriminatory motive, and sufficiently supports a judgment for the plaintiff, it cannot, by itself, compel a finding for the plaintiff.

Hicks eliminated some of the confusion regarding the application of pretext to defendants in employment discrimination litigation, a dispute continued over the role of pretext in the plaintiff's burden of proof. In Reeves, the Supreme Court unanimously resolved a circuit split involving the "pretext-plus" theory. The pretext-plus theory required additional evidence beyond the prima facie case, rather than a mere rejection of the defendant's nondiscriminatory explanation, to uphold a verdict for the plaintiff. This conclusion ignored the Court's statement in Hicks that a plaintiff's prima facie case combined with rejection of the defendant's explanation **"will permit the trier of fact to infer the ultimate fact of intentional discrimination"** without additional proof.

The Supreme Court clarified this principle in Reeves by eliminating any further use of the pretext-plus standard. Two grounds justify this principle. First, under evidence law, a trier of fact is "entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" Second, in the circumstances of an employment dispute, "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Although Reeves firmly established the role of pretext in the overall McDonnell Douglas framework, the courts of appeals remain divided on the issue of whether to require jury instructions about pretext.

The Supreme Court should resolve this circuit split.

APPEALS COURT SPLIT ON PRETEXT

Second Circuit Court of Appeals

One year after the Supreme Court decided Hicks, the Second Circuit became the first appellate court to mandate useof the pretext instruction. In Cabrera v. Jakabovitz, the Second Circuit addressed the inherent difficulties involved in adapting the complex McDonnell Douglas framework to a set of comprehensible jury instructions.The Second Circuit used Cabrera to distill two essential principles from the Supreme Court's decisions in McDonnell Douglas and Hicks. In accordance with its earlier emphasis on simplicity, the court stated the following:

"The jury needs to be told two things: (1) it is the plaintiff's burden to persuade the jurors by a preponderance of the evidence that the apartment (or job) was denied because of race (or, in other cases, because of some other legally invalid reason), [and] (2) the jury is entitled to infer, but need not infer, that this burden has been met if they find that the four facts previously set forth have been established and they disbelieve the defendant's explanation.

Seventh Circuit Court of Appeals

The Seventh Circuit did not read Hicks in this manner when addressing virtually the same issue, however, and declined to require use of the instruction. In Gehring v. Case Corporation, the Seventh Circuit addressed the question of appropriate jury instructions in an employment discrimination case arising under the Age Discrimination in Employment Act (ADEA).

In this case, unlike Cabrera, the plaintiff lost at trial, appealed, and argued that the trial court erred in failing to instruct the jury that it could infer discrimination if it did

not believe the defendant's explanation. The Seventh Circuit noted that, under Hicks, this instruction contains a "correct statement of the law" but declined the opportunity to mandate use of this principle.

Third Circuit Court of Appeals

The Third Circuit was the next federal court of appeals to address this issue, and it expressly aligned itself with the position of the Second Circuit in Cabrera mandating use of this instruction. **In Smith v. Borough of Wilkinsburg, the Third Circuit addressed an issue virtually identical to that considered by the Seventh Circuit in Gehring yet reached the opposite conclusion.** The plaintiff, whose claim arose under the ADEA, argued on appeal that the trial court had committed reversible error in refusing to instruct the jury on pretext. The Third Circuit agreed, and described the serious difficulties plaintiffs face when trying to prove an employment discrimination claim.

The court discussed the McDonnell Douglas tripartite formula and focused, in particular, on "the pivotal role played by pretext in the ultimate decision of discrimination," concluding that the focus of a trial conducted under this formula will invariably be the truthfulness of the defendant's explanation. Upon reaching this conclusion, the Third Circuit explicitly stated that it joined the Second Circuit in requiring the jury instruction on pretext.

Eleventh Circuit Court of Appeals

The Eleventh Circuit considered this issue in Palmer v. Board of Regents. The Eleventh Circuit considered the question of whether the plaintiff experienced prejudice because of the trial court's failure to instruct the jury on pretext. The court cited both the Second Circuit's decision in Cabrera and the Third Circuit's decision in Borough of Wilkinsburg with approval, yet it decided that the trial court had not erred in refusing to give the instruction.

First Circuit Court of Appeals

In Fite v. Digital Equipment Corp. , the First Circuit briefly addressed the plaintiff's claim of error regarding the trial court's refusal to instruct the jury on pretext.

Eighth Circuit Court of Appeals

In Moore v. Robertson Fire Protection District, the plaintiff properly preserved the claim of error, but the Eighth Circuit refused to find an abuse of discretion by the trial court for failing to instruct the jury on pretext. The court based its reasoning on two primary factors.

Tenth Circuit Court of Appeals

In Townsend v. Lumbermens Mutual Casualty Co.,' the Tenth Circuit squarely addressed the growing circuit split, provided the most recent and in-depth analysis of the issue, and decided to mandate use of the instruction in a sharply split decision. Townsend involved an African-American man who sued his former employer for rapidly demoting and then firing him after a decade-long employment relationship. The litigation focused primarily on the issue of whether the defendant insurance company provided a truthful reason for firing Townsend, because he presented impeachment evidence that questioned the veracity of the defendant's explanation. Despite the question of fact surrounding this evidence, the trial court refused to grant Townsend's request to instruct the jury that "if it did not believe Kemper's explanation, it could take this as evidence that Kemper's true motive for terminating him was discriminatory and could on this basis conclude-though it need not do so that Kemper terminated Townsend for a discriminatory reason.On appeal, Townsend argued primarily that this failure to instruct the jury on pretext constituted reversible error.

The Tenth Circuit, made the following ruling:

"We do not hold that a pretext instruction is always required, but rather that it is required where, as here, a rational finder of fact could reasonably find the defendant's explanation false and could "infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."

CLARITY FROM THE SUPREME COURT

It is very clear that the appeals courts are split on this issue. This is an issue of significant national importance that needs to be resolved by the Supreme Court.

CONCLUSION

For the foregoing reasons Plaintiff respectfully requests that the Supreme Court issue a writ of certiorari so that these two questions can be answered, and to remand this case back to district court for a retrial.

Respectfully submitted,

Lester Patrick
9522 Bismark Place
Stockton, Ca. 95209
(209) 957-2937

Ex; 15

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, DC 20543-001

JAN 21. 2009

Mr. Lester Patrick
9522 Bismark Place
Stockton, Ca 95209

Re: Lester Patrick
v. Department of Veteran Affairs

No. 08-727

Dear Mr. Patrick

The Court today entered the following order in the above entitled case.

The petition for a writ of certiorari is denied.

Sincerely,

// William K. Sutter, Clerk

To: SUPREME COURT OF THE UNITED

STATES

OFFICE OF THE CLERK

WASHINGTON, DC 20543-001

Feb 15, 2009

Mr. Lester Patrick
9522 Bismark Place
Stockton, Ca 95209

Re: Lester Patrick
v. Department of Veteran Affairs

No. 08-727

The certify that this motion for a rehearing is presented in good faith and not for delay, and addresses a new set of grounds for this case.

Sincerely,

Lester Patrick
2-15-09